CASES ON SURETYSHIP

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Where credit is
Joint promisors
Indemnity
Payment out of fund turned over to S.
Delcredary agent
Main purpose rule "Usually, but not always, if Principle debtor remains liable, the promise of the S or guar is collateral, and must be in writing. If there is Prin liable, a verbal promise is not enforceable if cosideration cosists of, 1, detriment to promisee, or 2, of incidental benifit to promisor, because it is a special promise with act. (S of F) If promisor in fact agrees to pay debt of another as an incident to obtaining an advantage for himself, then he is in fact agreeing to pay his own debt, as of not that of another, and he is bound on verbal promise. His promise is then an original and not collateral. this is meaning of main purpose rule"
10 Cornell Law Quarter 28, page 47
Mere premium is not within exception.

Surety = pers. liable of another's debt

Suretyship means surety, security

Purpose = 2 secure creditor v. loss caused by failure of debtor or employee 2 perform his duties.

Prin obligation = perform. secured (another promise, latter called accessorial promise

Principal & obligee

between surety + guarantor = surety is primary
obligation + ... looked 2 upon failure
has rt. 2 reimbursement = guarantor
promises either ... a TP ... perform
...ty or if TP doesn't then he ...
so there is condition precedent.

...rantor of collectibility = no liab. 2
pay unless legal proceedings

Distinction between guarantor + warranty
g = collateral liab. - conditionally on
failure of others 2 perform = if broken then
enforceable = must B - writing = entitled 2
reimburse.

w - independent promise 2 protect promisee
v. loss if warranties ... promisor
secondary liab. = entitled 2 reimburse.

endorser liable if holder of instrument can't collect

indemnity = primary oblig. = not conditional

at C. Law - no rts. 4 women but @ eq. / if
24 O.S. 465 Corp ... on surety contrt unless Corp
organized 2 engage ... p'ship.
... Bind other 2 contrt ... p'ship

surety's obligation [illegible]
together with Prin. Promises 2 pay if Prin. fails 2 pay a [illegible]
guarantor's is separate contr. & [illegible]
on separate consid. & entered into ([illegible]
subsequently) & on a dif. instrument
& can't B sued jointly with Prin.
promises 2 pay if Prin. can't
Indorser = Prin. 2 each subsequent
party = secondarily liable, demand
necessary [illegible]

Review — distinction between surety & guarantor
surety = (jointly & severally with pr[illegible]
primary liab: (Action of debt in c[illegible]
entitled 2 reimburse.

guarantor — promise separate, cond[illegible]
on failure of Prin 2 pay; secondary
action of assumpsit. In absence of
g. can't B sued jointly with prin
90 O.S. 75; 31 O.S. 41; 31 O.S. 15[illegible]
g. & prin R - joint promisors but ca[illegible]
sued together 36 O.S. 336

G.C. 11258 11583 Prtner — prtners R jointly & several[ly]
liable

CASES ON THE
LAW OF SURETYSHIP

SELECTED AND ANNOTATED

By

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PREFACE

The last decade has witnessed many changes in the law of Suretyship. The Corporate Surety is rapidly replacing the Personal Surety. Business men prefer the promise of a Corporate Surety of recognized solvency to that of the individual of doubtful responsibility. Federal, State and Municipal laws require contractors engaged in the construction of public buildings and improvements to furnish bonds to secure their performance. The amounts involved are such that no one other than the Corporate Surety cares or is able to undertake the risk. Probably more contracts of suretyship have been written in the last ten years than in the century preceding, and of these, approximately seventy-five per cent. have been signed by the Corporate Surety. Chartered for the business of taking risks, preparing its own contract, exacting a premium for its undertaking, the Corporate Surety is not "the favorite of the law" which the Personal Surety is. Defenses and remedies available to the latter are sometimes curtailed or even denied when sought by the former. The consideration shown by the courts to the Personal Surety in the construction and application of his contract is seldom found when the contract of a Corporate Surety is the subject of litigation. It is for the purpose of acquainting the student with this departure from the old principles of the law of Suretyship that the author seeks to justify the publication of this selection of cases. It is not to be understood, however, that the cases selected concern the Corporate Surety only. A very large majority of the cases relate to the contract of the Private Surety.

Very little abridgement of the opinions of the court has been made. Statements of facts, where the opinion is sufficiently explanatory, have been omitted, and some have been revised. Arguments of counsel have sometimes been set forth where they are of value in illuminating the processes of reasoning leading up to the decision of the court. Editorial notes and annotations are few, the author believing that professors prefer to make their own references to their classes from more recent current decisions. An acknowledgment is due Professors Ames, Stearns and Henning, from whose books the author has derived much assistance.

CLINTON DE WITT.

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CASES ON SURETYSHIP

CHAPTER I

THE CONTRACT

SECTION 1. SURETY, GUARANTOR AND INDORSER DISTINGUISHED

SAINT ET AL. *v.* WHEELER & WILSON MFG. CO.

95 *Ala.* 363, 10 *So.* 539 (1891).

Action by the Wheeler & Wilson Manufacturing Company against R. F. Saint, as principal, and C. W. Wright, A. J. Crosthwaite and J. R. Spragins, sureties, upon a bond for the performance of a contract of employment by defendant Saint with plaintiff. Verdict and judgment for plaintiff. Defendants appeal. Reversed.

McClellan, J.: The contract sued is not a guaranty, but one of suretyship. Crosthwaite and the other defendants, who undertake that Saint shall faithfully perform his contract with the company, are sureties of Saint, and not guarantors. The distinction between the two classes of undertakings is often shadowy, and often not observed by judges and text-writers; but that there is a substantive distinction, involving not infrequently important consequences, is, of course, not to be doubted. It seems to lie in this: that when the sponsors for another assume a primary and direct liability, whether conditional or not, in the sense of being immediate or postponed till some subsequent occurrence, to the creditor, they are sureties; but when this responsibility is secondary, and collateral to that of the principal, they are guarantors. Or, as otherwise stated, if they undertake to pay money or do any other act in the event their principal fails therein, they are sureties; but, if they assume the performance only in the event the principal is unable to perform, they are guarantors. Or, yet another and more concise statement, a surety is one who undertakes to pay if the debtor do not; a guarantor, if the debtor can not. The first is sponsor absolutely and directly for the principal's acts; the latter, only for the principal's ability to do the act. "The one is the insurer of the debt; the other, an insurer of the solvency of the debtor." This is the essential distinction. There is another, going as well to its form. The contract of suretyship is the

joint and several contract of the principal and surety. "The contract of the guarantor is his own separate undertaking, in which the principal does not join." Indeed, it has been held, pretermitting all other considerations, that no contract joined in by the debtor and another can be one of guaranty on the part of the latter (McMillan v. Bank, 32 Ind. 11), though we apprehend that a case might be put, involving only secondary liability on the sponsors, though the undertaking be signed also by the principal. However that may be, it is certain that in most cases the joint execution of a contract by the principal and another operates to exclude the idea of a guaranty, and that in all cases such fact is an index pointing to suretyship. See Brandt Sur., 1, 2; 9 Amer. & Eng. Enc. Law, p. 68; Marberger v. Pott, 16 Pa. St. 9; Allen v. Hubert, 49 Pa. St. 259; Reigart v. White, 52 Pa. St. 438; Kramph's Exr. v. Hatz's Exr., Id. 525; Birdsall v. Heacock, 32 Ohio St. 177; Hartman v. Bank, 103 Pa. St. 581; Courtis v. Dennis, 7 Metc. (Mass.) 510; Kearnes v. Montgomery, 4 W. Va. 29; Walker v. Forbes, 25 Ala. 139.

Applying these principles to the bond sued on, the conclusion must be that it is not a guaranty, but a contract of suretyship, on the part of Crosthwaite, Wright, Hall and Spragins. It is not their separate undertaking, but the principal also executes it. While they employ the word "guaranty," they directly obligate themselves, along with Saint, to pay absolutely and wholly, irrespective of Saint's solvency or insolvency, all damages which may result to the obligee from his default. Not only so, but they expressly stipulate that the company need not exhaust its remedies against Saint before proceeding against them. It is, in other words, and in short, a primary undertaking on their part—not secondary and collateral—to pay to the company in the event of Saint's failure, and not an undertaking to pay only in the event of Saint's default and inability to pay. They are sureties of Saint, and not his guarantors; and their rights depend upon the law applicable to the former relation, and not upon the law controlling the latter.*

NORTHERN STATE BANK OF GRAND FORKS, A CORPORATION, *v.* JAMES BELLAMY, SR.

19 *N. Dak.* 509, 125 *N. W.* 888, 31 *L. R. A. (N. S.)* 149 (1910).

Ellsworth, J.: The record on appeal in this case consists of the judgment roll alone, and from the finding of fact made by the trial court it appears that on February 17, 1906, the Drayton Milling Company, a corporation, made and delivered to the plaintiff its

*Part of the opinion is omitted.
See also Stearns on Suretyship, 2nd ed., § 6.

promissory note for $6,000, which note was indorsed as follows: "Pay Northern State Bank, Grand Forks, N. D., or order. For value received, I hereby guarantee the payment of the within note and hereby waive presentment, demand, protest and notice of protest." This writing upon the back of the note was signed by the defendant and appellant, Bellamy, and several others. The sum of $2,000 and interest on this note to April 1, 1907, was paid by the maker. On October 24, 1906, and again on December 17, 1906, plaintiff, without the knowledge or consent of appellant, Bellamy, for a valuable consideration, entered into an agreement with the defendant Drayton Milling Company, by the terms of which it was agreed that the payment of the note should be extended for a period, in each case, of ninety days. At the expiration of the extended time, Drayton Milling Company, the maker of the note, being in default of the balance due upon it, suit was commenced against it and the parties signing the guaranty on the back of the note. Appellant answered in this suit, setting out facts substantially as hereinbefore narrated and claimed as a defense to the action that by the extension of time of payment made to Drayton Milling Company, the principal debtor, he was released from liability upon his guaranty. The trial court held that appellant was in law a surety, and as such primarily liable upon the note sued upon, and was therefore not released from liability by the extension of time allowed Drayton Milling Company. The only question presented for determination upon this appeal is the correctness of this holding.

The trial court found that appellant received no part of the consideration for the loan made by plaintiff to Drayton Milling Company, nor was the loan for his benefit; that he was not the principal debtor in said loan, or in any manner liable upon the note except by signing the agreement upon the back, the wording of which is above set out. His liability was, therefore, in no manner distinguishable from that of an absolute guarantor of payment, and must be measured by settled rules applicable to that relation.

*   *   *   *   *   *   *

The nature and character of the contract of guaranty is an important factor in the determination of this point. Guaranty is an undertaking by one person that another shall perform his contract or fulfill his obligation, and that in case he does not do so the guarantor will do it for him. A guarantor of a bill or note is the one who engages that the note shall be paid. The "contract of guaranty" is broadly and clearly distinguished from that of suretyship. "A contract of suretyship is a contract by which the surety becomes bound as the principal or original debtor is bound. It is a primary obligation, and the creditor is not required to proceed first against the principal before he can recover from the surety. The surety is bound with his principal as an original promisor, that is, he is a

debtor from the beginning and must see that the debt is paid and is held ordinarily to know every default of his principal, and can not protect himself by the mere indulgence of the creditor, nor by want of notice of the default of the principal, however such indulgence or want of notice may, in fact, injure him. Being bound with the principal, his obligation to pay is equally absolute. On the other hand, the contract of a guarantor is his own separate contract; it is in the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done, and is not merely an engagement jointly with the principal to do the thing. A guarantor, not being a joint contractor with his principal, is not bound to do what the principal has contracted to do, like a surety, but only to answer for the consequences of the default of the principal. The guarantor has to answer for the consequences of his principal's default. A surety is an insurer of the debt. A guarantor is an insurer of the solvency of the debtor. A surety may be sued as promisor, but a guarantor can not." Ogden, Negotiable Instruments, § 220.

With these considerations in mind, it is apparent that while, in its ultimate results, the liability of a guarantor may be as absolute as that of a surety, the nature of his contract and the procedure necessary to hold him are very different. Authorities all agree that a contract of guaranty is entirely separate from that contained in the negotiable instrument to which it is appended, and that the remedy of the holder of the note against a guarantor must be pursued as a distinct cause of action. Ogden, Negotiable Instruments, § 220. By express provision of our code persons liable severally for the same debt or demand, although upon different obligation or instruments, may, at the option of the plaintiff, be included as parties to the same action. Section 6819, Rev. Codes 1905. In the absence of this provision, a guarantor must be proceeded against in a separate action. The fact that his contract is indorsed upon the negotiable instrument by which he is bound does not in the least alter the character of his obligation. "The engagement or contract of guaranty may be and often is written on the back of the note or bill, but it may as well, so far as the guaranty is concerned, be written on a separate piece of paper." 2 Parson's Notes and Bills, 119. "The contract of a guarantor is his own separate contract. It is in the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done, and not merely an engagement jointly with the principal to do the thing. The surety's promise is to pay a debt which becomes his own debt when the principal fails to pay it. But the guarantor's promise is always to pay the debt of another." Coleman v. Fuller, 105 N. Car. 328; Rouse v. Wooten, ~~140 N. Car~~. 557. A liability such as this, although it may result in requiring a guarantor to pay the note, is not predicated upon "the terms of the instrument," but upon a contract entirely separate and distinct.

The terms "primary and secondary," when they apply to the par-

ties to an obligation, "refer to the remedy provided by the law for enforcing the obligation, rather than to the character and limits of the obligation itself." Kilton v. Prov. Tool Co., 22 R. I. 605. Therefore, however closely analogous may be the ultimate liability upon the instrument of surety and guarantor, the clear distinction in the character of their respective contracts, and the procedure by which their obligations must be enforced, operates to place these parties in different classes of the persons liable as defined by the new law of negotiable instruments. The purpose in making a classification not provided by the former law would seem to be to strengthen the credit of negotiable paper by protecting the holder against a claim that persons directly and absolutely liable by the terms of the instrument had in fact signed, not as joint makers, but in some other capacity. As the law now stands, these questions of primary and secondary liability are to be resolved only upon the face of the instrument. All persons by its terms absolutely required to pay the same may be held as primarily liable, all others, secondarily. When a party on signing clearly indicates upon the instrument the capacity in which he is willing to be bound, the holder in accepting it can not misapprehend its true quality, for he then knows that the party may be held in that capacity and no other. Appellant signed as guarantor, and, as in that capacity he was secondarily liable upon the instrument, he was released, as under the former law, by an extension of time to the principal debtor without his assent. As affecting him the principle governing the relation of holder and guarantor under the former law is unchanged.

The judgment of the district court against the defendant, Bellamy, is reversed, and it is directed to dismiss the action as to him. All concur.

Spalding, J.: I concur in the result, but can not assent to all that is said in the opinion.

See also J. W. Watkins Medical Co. v. Lovelady, 186 Ala. 414, 65 So. 52, where the parties were described in the contract as sureties but were held by the court as guarantors.

ROCKFIELD ET AL. *v.* THE FIRST NATIONAL BANK

77 Ohio St. 311, 83 *N. E.* 392, 14 *L. R. A. (N. S.)* 842 (1907).

Action was brought in the common pleas of Clark by The First National Bank of Springfield against H. L. Rockfield, L. M. Goode, E. H. Ackerson, John Snyder, Frank Patterson and The Springfield, Charleston, Washington & Chillicothe Railway Company, to recover on a promissory note, a copy of which follows:

"$10,000 SPRINGFIELD, OHIO, December 12, 1904.

On demand after date we jointly and severally promise to pay The First National Bank of Springfield, Ohio, or order, at its banking house ten thousand dollars for value received, with six per cent. interest after date.

(Signed) THE SPRINGFIELD, CHARLESTON, WASHINGTON & CHILLICOTHE RAILWAY COMPANY.
H. L. ROCKFIELD, President;
E. H. ACKERSON, Secretary."

On the back of the note appeared these names: "John Snyder, Frank Patterson, L. M. Goode, E. H. Ackerson."

The petition avers that there were no credits and that there was due plaintiff from defendants ten thousand dollars with interest from date. It further avers that the defendants, Rockfield, Goode, Ackerson, Snyder and Patterson, indorsed the note before it was delivered to plaintiff; that due demand had been made of each defendant July 5, 1905, but no part had been paid.

Demurrers were interposed by defendants, Rockfield, Snyder and Ackerson, which being overruled those defendants answered admitting that they indorsed the note before delivering it to plaintiff, but averred that they indorsed it for accommodation only, receiving no consideration whatever for so indorsing the note. Also that defendants were not notified of the non-payment of the note by the maker at maturity, and, therefore, were not indebted to the plaintiff in any sum. To this answer plaintiff demurred. This demurrer was sustained, and the answering defendants not desiring to plead further, judgment was rendered against them for the amount claimed and costs. On error to the circuit court this judgment was affirmed. Rockfield and Snyder, by this proceeding, ask a reversal of the judgments below.

SPEAR, J.: Whether or not the answer avers a defense to the cause of action set up in the petition is the question here. The theory of the defendants' pleading is that Rockfield and Snyder, by writing their names across the back of the note, became indorsers in the commercial sense, and therefore entitled to notice of demand at maturity of the maker and of non-payment, and, failing that, no liability attached. The theory of the petition is that these defendants, having signed the note before delivery, must be held to have signed with the purpose of giving it credit and of aiding negotiability, and therefore stand as makers, and although their names appear on the back of the instrument, and they are in law sureties, yet they are not indorsers in the commercial sense and therefore not entitled to notice of demand and non-payment. This view is the one adopted by the trial court which incorporated in the judgment entry a finding that the defendants are indebted as joint and several makers of the note, and this is the view taken of the question by the circuit

court in affirming the judgment of the common pleas. Which is the correct view is the question we have. And here it is proper to express our obligation to the learned counsel whose ample and luminous briefs have greatly aided in our examination and disposition of the case.

That the conclusion adopted by the lower courts is in accord with the law as held in this state from early times, and with all decisions of this court thus far made, is conceded. The latest deliverance on the subject is the case of Ewan v. The Brooks-Waterfield Co., 55 Ohio St. 596, opinion by Williams, C. J. It is there held that where the name of a third party, a stranger to the note, appears in blank upon the back of the note at the time it takes effect, his undertaking rests upon the consideration which supports the note, and the presumption is that he intended to be liable as a surety, and he will be held accordingly unless it is shown that there was a different agreement between the parties. This conclusion is reached after a careful and somewhat extended review of authorities, many of them decisions of this court, and is supported by strong and convincing argument. While a contrary doctrine, holding such party to be an indorser in the commercial sense, had been held in a number of states, notably Alabama, California, Connecticut, Indiana, Mississippi, New York, Oregon, Pennsylvania and Wisconsin, the Ohio rule, as above indicated, had been the settled common-law rule of the states of Arkansas, Colorado, Delaware, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, North Carolina, Rhode Island, South Carolina, Texas, Utah and Vermont.

The statute referred to is the act of April 17, 1902, known as the Negotiable Instruments Act (95 O. L. 162), carries into the Revised Statutes as §§ 3171 to 3178g, inclusive, the particular sections relied upon being 3171, 3173h, 3173i, 3173k, 3173q, 3174g and 3178a. By the provisions of these sections a negotiable instrument must be in writing and signed by the maker or drawer. The person primarily liable is the person who by the terms of the instrument is absolutely required to pay the same, all others being secondarily liable. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser unless he clearly indicates, by appropriate words, his intention to be bound in some other capacity. Then follows, as to liability, this: Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser: 1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. 2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. 3. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee. Every indorser who indorses without qualification, guarantees to all subsequent holders the genuineness

of the instrument, the title, the capacity of previous parties to contract, etc., and engages that on due presentment the instrument shall be accepted or paid or both, as the case may be, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. Presentment for payment must be made at a reasonable hour on a business day at a proper place, to the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made. When such instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

The question at issue very largely turns upon what is meant by the terms of § 3173i, the substance of which we here repeat: "Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser," etc. It seems to have been the view of the learned circuit court (see opinion by Dustin, J., 8 O. C., N. S., 290), that inasmuch as the liability defined by the rules following the above quoted portion of § 3173i, does not differ essentially from the liability attaching to such party under the decisions of this court, that no change in the law can be presumed to have been intended by the general assembly in the enactment of the statute. Also that the subsequent provisions of the sections relating to indorsers and providing what shall be done to fix liability, etc., are not inconsistent with this conclusion because the later sections apply only to general indorsers, and in those sections every indorser is described as such, is called indorser, while in the earlier section the party described is only to be deemed an indorser, and has the liability of an indorser only to a limited extent. The contention further is that the terms of § 3173h forbid the conclusion that such party is to be deemed an indorser in the commercial sense because he must, in order to have that effect, place his name on the back otherwise than as maker, and the rule is and was, that the person so placing his name is a maker unless he shows a different agreement between the parties.

There is much plausibility in these contentions, and they would seem to be sound were it not for the incorporation of the words "as indorser" in § 3173i. Had these words been left out of the section the construction claimed would not seem an unnatural one. But we are required, by the inexorable rule of construction, to give to them some signification, some meaning consistent with a rational purpose in placing them in the statute. The lawmakers were making law. They can not be presumed to have been simply dealing with legal terms in a loose, popular sense. The word "indorser" has a distinct, clearly defined legal meaning. An indorser is one who undertakes to be responsible to the holder of the paper for the amount thereof, if

the latter shall, at maturity, make legal demand of the payer, and in default of payment, give proper notice thereof to the indorser. The language of the section is plain and free from ambiguity. The words express a clear meaning. The party has placed his name upon the instrument where general indorsers sign. He is not a party to the note, but a stranger. Section 3171h says he shall be deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity. He has not so indicated. He has used no words appropriate or otherwise. His status on the paper is, therefore, fixed by the emphatic words of the statute. Then follows the fixing of liability. He is liable "as indorser." And how is that? Why, he must pay when, and only when, proper demand has been made of the maker at maturity and legal notice given him. This is clearly shown by what follows. Every indorser who indorses without qualification engages that on due presentment and dishonor, and due notice to him, he will pay. This expresses the extent of his liability; without these requisites being complied with he is discharged. And, then, as though to cover a doubtful situation, the provision is (§ 3171p) that where the language of an instrument is ambiguous because of the signature being so placed that it is not clear in what capacity the person intended to sign, he is deemed to be an indorser. Of the rules prescribed by § 3173i, it is enough to say that they are not inconsistent with the obligation of the general indorser. He, too, is liable to those who come after him as indorsers or holder. The important question is not to whom is such party liable, but in what capacity, in what relation, is he liable?

The contention that the provision (§ 3173k) to the effect that every indorser undertakes to pay if the instrument is dishonored and he has due notice applies only to general indorsers, we think untenable. The language forbids it. It is: "Every indorser who indorses without qualification," etc. The word "every" is a term of inclusion. It embraces every party who, by previous provisions, is classed as an indorser unless his indorsement has been qualified by appropriate words. Nor is the obligation as indorser imposed on the stranger an unreasonable one, for, if not content to assume the position of indorser, the opportunity to indicate upon the paper his intention to be bound in some other capacity is given him.

The contention that these later provisions relate only to general indorsers rests wholly on the assumption that in placing his name on the back in blank the stranger himself fixes his own position and that he has conclusively declared himself a maker; that is, that he has placed his name as maker. But it seems a sufficient answer to this to say that he has not and could not, by a mere blank indorsement, so place himself, because the statute fixes his position. That position is important only as it relates to his liability, and the statute has said that that liability is "as indorser." An indorser is not a maker or a drawer; not one primarily liable. This conclusion ignores neither

the words: "A person placing his name upon an instrument otherwise than as maker," etc., nor the words: "Where a person not otherwise a party to an instrument places," etc. Both sections must be construed together. Thus construed they simply describe a person who is not, in fact, such party in any possible sense at the time he places his signature. He remains a total stranger until he has placed his name on the back, and then the statute says he is an indorser.

* * * * * * *

But another purpose seems to us to be indicated by this legislation. Not only were the courts of the country in conflict respecting the attitude and liability of a third party, a stranger, who placed his name in blank on the back of commercial paper, but the situation was in itself an anomalous one, calculated to lead, as it often did lead, to confusion respecting the duty of the holder of such paper with regard to demand and notice. Mistakes in this respect were easy and were frequently made, often resulting in litigation, and, not infrequently, loss. To clear this situation up, and to establish a plain, easily understood rule, and one of universal application, was surely a result of high importance to all who deal in commercial paper, and it seems to us that the desire to accomplish this purpose had much to do with inducing the enactment of the Negotiable Instruments act by our general assembly.

It follows from these conclusions that by force of §§ 3171, 3173h, 3173i, 3173k, 3173q, 3174g and 3178a, of the Revised Statutes, a person who, being a stranger to a promissory note, places his name on the back by blank indorsement, is an indorser of the paper and can not be held in any other capacity. As such he is entitled, in order to render him liable, to notice of demand upon those who are primarily liable, and failing such demand and due notice to him, he is discharged. The answer, therefore, stated a defense, and the sustaining of the demurrer and rendering judgment for the Bank upon the note was error. Judgment reversed and cause remanded.

Reversed.

Shauck, J. J., Price, Crew, Sumners and Davis, J. J., concur.

SECTION 2. CAPACITY OF THE PARTIES TO THE CONTRACT

A. J. HARNER *v.* LAWRENCE DIPPLE

31 *Ohio St.* 72, 27 *Am. Rep.* 496 (1876).

The original action was brought by Dipple against Harner on an undertaking for stay of execution, executed by the defendant during his minority. It appears that the defendant arrived at his majority before the period of stay expired, and that after the expiration of

the stay he acknowledged his liability, and promised the plaintiff, to whom the undertaking was made, to pay the amount of the judgment stayed. Upon this statement of facts judgment was rendered for the plaintiff in the court of common pleas; which judgment was afterward affirmed by the district court.

To reverse these judgments leave is now asked to file a petition in error.

McIlvaine, J.: The question made is, was the undertaking sued on absolutely void, or only voidable. If void, it was not subject to ratification; if voidable merely, it may be enforced after ratification.

Having considered this question upon principle, as well as upon authority, we are constrained to hold that the undertaking was voidable only, and that after ratification it became a valid and binding agreement.

In disposing of this case, we make no note of those principles which control cases where an infant, by reason of immaturity and natural incapacity, is, in fact, unable to assent to the terms of an alleged contract. When this undertaking was executed it contained every element of a valid contract, save only, that the party was under twenty-one years of age.

Except for necessaries, the law grants to infants immunity from liability on their contracts. This immunity is intended for their protection against imposition and imprudence, and is continued after majority as a mere personal privilege. This privilege of immunity, after majority, is not given because of the actual or supposed incapacity of an infant to enter into contracts intelligently and prudently. If actual incapacity existed, the privilege of infancy would not be needed for the purpose of defense. And it is contrary to our knowledge of human nature, that all infants are incapable of intelligently and prudently entering into engagements and assuming burdens. It is a matter of favor intended as a shield and compensation for the want of that greater wisdom and prudence which time and experience usually teach.

But, whatever may have been the natural capacity of the infant whenever he arrives at majority, a time fixed by an arbitrary rule which, in the nature of things, can not affect the personal capabilities of its subject, the law presumes that he has acquired all the wisdom and prudence necessary for the proper management of his affairs; hence, the law imposes upon him full responsibility for all his acts and contracts.

In this new relation, it becomes his moral duty, and for its discharge he is invested with legal capacity, to affirm and perform or to disavow, at his election, all his previous contracts of imperfect obligation. Contracts for necessaries are of perfect obligation, and, therefore, he can not disaffirm them. Contracts founded on illegal considerations are of no obligation, and, therefore, may not be affirmed.

The appointment of an agent or attorney to make contracts is, perhaps, inconsistent and repugnant to the privilege of infancy, for the reason, among others that might be named, that it is imparting a power which the principal does not possess: that of performing valid acts. But, outside of these exceptions, which are based on special grounds, we see no reason why the power should be denied, to ratify any contract which, as an adult, he might originally make. The power of disaffirmance being co-extensive, it is all that is needed for his protection.

If, in the case before us, the ratification had been made by payment, instead of a promise to pay, its binding effect would not be doubted. Why, therefore, should not the promise to pay be binding also? There is no question about consideration. The consideration which supported the original promise is sufficient to support the ratifying promise. The only contention here is, that the original promise was void by reason of infancy, not for want of consideration. If, therefore, actual performance by payment would have been binding, so should the promise to perform; and this, too, without regard to the fact whether or not the infantile contract was beneficial or prejudicial. The principles of jurisprudence are not violated by the performance of a contract prejudicial to the party. Indeed, a person, sui juris, is as strongly obligated by his contracts prejudicial as by those beneficial to himself; and the same principle should apply where a person, sui juris, ratifies and confirms his contract of infancy.

The plaintiff in error, however, relies chiefly on the authority of decided cases, and claims the settled law to be that all contracts of an infant prejudicial to him are absolutely void, and that a contract of suretyship is of that class.

In Swan's late treatise, among contracts of infants which have been decided to be void, is mentioned that of suretyship, but the author, in speaking of the state of the authorities, pithily and truthfully remarks, "What contracts of an infant are void, and what are merely voidable, nobody knows."

Keanes v. Bagcott, 2 H. Black, 511, decided in 1795, appears to be a leading case. The contract of an infant was held in that case to be voidable only, but in the opinion of C. J. Eyre a rule was stated, wherein certain of such contracts are said to be void. The rule was thus stated: "When the court can pronounce the contract to be for the benefit of an infant, as for necessaries, it is good; when to his prejudice, it is void; and where the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant." This rule, modified so as to declare that a contract necessarily prejudicial to the infant is void, has been adopted in many later cases, both in England and in this country. But the current of more recent decisions repudiates the distinction between void and voidable contracts, on account of their beneficial or prejudicial nature, and

holds them all to be voidable merely; and the more recent decisions of courts still adhering to the distinction, hold some contracts voidable only, which were before held to be void. Thus, in Owen v. Long, 112 Mass. 403, a surety contract was held voidable only, for the reason that such contract, as matter of law, can not be said to be necessarily prejudicial to the surety. Also an account stated is held voidable only. Williams v. Moor, 11M. & W. 255. Also a conveyance by lease and release. Touch v. Parsons, 3 Barrows, 1794.

* * * * * * *

In Massachusetts, where the doctrine was approved that the acts of an infant are void, which not only apparently but necessarily operate to his prejudice (Oliver v. Clop, 13 Mass. 237), it was afterward said by Chief Justice Parker, in Whitney v. Dutch, 14 Mass. 457: "Perhaps it may be assumed as a principle that all simple contracts by infants, which are not founded on an illegal consideration, are strictly not void, but only voidable, and may be made good by ratification. They remain a legal substratum for a future assent, until avoided by the infant; and if, instead of avoiding, he confirm them, when he has legal capacity to make a contract, they are, in all respects, like contracts made by adults." And in 1840 (Reed v. Batchelder, 1 Met. 559), Chief Justice Shaw said: "The question, what acts of an infant are voidable and what void, is not very definitely settled by the authorities; but, in general, it may be said that the tendency of modern decisions is to consider them as voidable, and thus leave the infant to affirm or disaffirm them when he comes of age, as his own views of his interest may lead him to elect." * * *

In the light of principle, therefore, as well as by the weight of the later authorities, the whole question should be thus resolved: The privilege of infancy is accorded for the protection of the infant from injury, resulting from imposition by others, or his own indiscretion. That object is fully accomplished by conferring on him immunity from liability until such contracts are ratified by himself after arriving at full age.

And, again, that an adult, laboring under no disability, may perform his unexecuted contract of infancy, whether they be beneficial or prejudicial to him, and that he will be bound by such performance, we think, is a proposition too plain to be doubted. If, therefore, with full knowledge of the facts, he ratifies and affirms them, being moved thereto by his own sense of right and duty, he should, in law, as in morals, be bound to their performance.

Motion overruled.

Note: In order to make ratification of suretyship contract when infant becomes of age binding he must have knowledge that his infancy at the time of signing is available as a defense. Owen v. Long, 112 Mass. 403; Fetrow v. Wiseman, 40 Ind. 148; Hinely v. Margaritz, 3 Pa. St. 428.

Contra: Anderson v. Soward, 40 Ohio St. 325, 48 Am. Rep. 687.

PERKINS AND OTHERS, APPELLANTS, AND ELLIOTT AND WIFE RESPONDENTS

23 N. J. Eq. 526 (1872).

The opinion of the court was delivered by the chief justice.

The bill in this case alleges that the female defendant, Louisa Elliott, is seized and possessed of certain real and personal estate for her separate use, by force of the statute of this state for the better securing the property of married women, and that having such property she, in conjunction with her husband, made a joint and several promissory note, containing an express provision that it should be a charge upon the separate estate of the feme. The purpose of this action is to enforce this provision, and charge the money due upon this note upon the separate estate of the wife. This the chancellor refused to do, holding that a married woman invested with the property and interest created by the act, just referred to, could not, by her simple contract in writing, bind herself as surety for another, so that a court of equity would enforce such obligation against her, even though the intention to bind her separate estate was clear, and was expressed in the instrument executed by her. The precise point of this decision is new to the jurisprudence of this state, and is a question of considerable moment. My researches into the subject have been attended with more than ordinary interest, and I have examined the numerous decisions with attention and care, and my conclusion is, contrary to my preconceived opinion, that the state of the law is such that this court is at liberty to deal with the question at issue as one which is entirely undecided in our courts, and concerning which no peremptory authority exists. My examination has satisfied me that this entire subject, with respect to the power of the feme covert over her separate estate, has been the creation of the court of equity, and that the system has been, from time to time, circumscribed or extended, not under the coercion of any inflexible rules or established principles, but in accordance with judicial opinion founded on very general considerations as to the propriety or policy of the particular circumscription or expansion. No one who has the least acquaintance with the topic can doubt that the rule that a feme can bind her separate estate by a contract of suretyship, and this too in the absence of any expressed intent so to do, is, and has been for a long time past, entirely settled in the English courts. But still the doctrine, in its established form, is not sufficiently ancient to have in this court an imperative force, and the consequence is, as I have already remarked, the way is open for us to adopt a rule which will embrace, or one which will exclude, the power which has been exercised in the present instance.

Looking back to the beginning of this system, we find that the separate estate itself of the feme covert is a pure creature of equity.

It bears no analogy to anything existing in the common law. According to the general legal doctrine, the effect of marriage was to merge the existence of the wife into the legal life of the husband, so that with respect to property and civil rights, she, as a separate person, had no recognition. In open derogation of this cardinal principle, equity chose to invest her with a capacity to hold property in her individual right. It is certainly not to be wondered at that an estate thus originating in this clear violation of the laws of property as between husband and wife, should have been afterward modified to suit the supposed convenience or exigency of the case.

Nor did equity scruple to introduce another anomaly when the occasion seemed to require it. It having been settled that the wife might enjoy a separate estate, the result was, as the laws of property attached to it, that she could alienate it, and this power in its application to settlements, proving disadvantageous, the defect was remedied by another violation of legal rules, and a restraint against alienation inconsistent with the nature of the estate granted, was supported. The structure raised on a foundation thus arbitrarily laid, could of necessity have no other form than that which would proceed from the will of the builders. And such in truth was the result.

The married woman being thus recognized as the owner of the estate, the question arose as to the nature and extent of her authority over it. It became obvious at once, that in order to enjoy the privilege thus granted she must be allowed to make contracts with respect to her separate interests, and it was accordingly soon intimated in Grigby v. Cox, 1 Ves., sen., 517, and in Peacock v. Monk, 2 Ves., sen., 190, that to this extent she would be regarded in equity as a feme sole. The result was that those contracts which a woman under coverture made touching her separate property, although void at law, were universally enforced in equity, the principle at first being that such contracts, operating on the property, were in the nature of the execution of a power of appointment. But it was soon supposed that this principle was not broad enough to satisfy the purposes to be subserved, and accordingly in the great case of Hulme v. Tenant, 1 Bro. C. C. 16, Lord Thurlow decided that a bond of a feme covert, jointly with her husband, would bind her separate property. His language is: "I have no doubt about this principle, that if a court of equity says a feme covert may have a separate estate, the court will bind her to the whole extent as to making that estate liable to her own engagements, as, for instance, for the payment of debts, etc. This case does not appear to have been entirely satisfactory to Lord Eldon, but he never judicially departed from it, and it has been followed in many subsequent cases, and according to Lord Cottenham, it contains the correct view of the principle upon which equity acts in giving effect to the agreements of married women. Owens v. Dickenson, 1 Cr. & Ph. 54.

And although the theory of the English courts on this subject has, after an agitation of a century, settled into form and coherence, the process by which this result has been produced has not escaped the criticism of some of the most distinguished of American lawyers. Chancellor Kent, in the case of the Methodist Church v. Jaques, 3 Johns. Ch. 77, uses this language: "It is difficult to perceive upon what reasoning or doctrine the bond or parol promises of a feme covert could for a moment be deemed valid. She is incapable of contracting according to the 'common right' mentioned by Lord Macclesfield; and if investing her with separate property gives her the capacity of a feme sole, it is only when she is directly dealing with that very property. The cases do not pretend to give her any of the rights of a feme sole in any other view, or for any other purpose." A similar stricture is pronounced by Judge Story in his work on Equity Jurisprudence. Nor have the English principles on this subject been received, in their integrity, by many of the courts in this country, and perhaps it is not too much to say that the law regulating the dominion of femes covert over their own property, as it at present exists, is not identical in any two of the United States.

The proposition is this: Shall a court of equity enforce against the separate property of a married woman a contract of suretyship made by her, from moral considerations? It seems to me, that for this court to execute such an agreement would be to apply the principle that a feme covert is to be regarded in equity as discovert with respect to her separate estate, and with respect to contracts relating to it, with an unwise latitude. The concession to a feme of a capacity to hold a separate estate, in an absolute form, necessarily carries with it all the powers which are requisite to the enjoyment and disposition of such property. As owner, she can sell it, or encumber it, or transfer it even as a gift. Considering her as the separate proprietor, these capacities are comprehended among the qualities of the estate, with the title to which she is invested. So it may also be forcibly insisted that the general engagements will be charged by equity against her property, the argument being that when she contracts a debt she makes use of her separate property, and, as it were, converts it by anticipation, pro tanto, into money. A feme covert, who borrows money, necessarily does so as the owner of a separate estate, for she can bind herself in no other capacity; the inference, therefore, from such act, certainly is not forced or far-fetched, that her intention was to charge her property. I can, therefore, readily comprehend how the English doctrine has grown up, that all the debts incurred by a married woman for her own benefit, or for the benefit of her estate, should be imposed on her individual property, on the ground of a manifest design to create such an encumbrance, and because it is one of the modes of enjoying property, to incur debts on the credit of it. But, when we proceed a step farther, and come to an agreement to stand as the surety of an-

other, I confess I lose sight of the principle on which the general system should rest. Such obligations have nothing to do with the separate estate of the feme. The right to create them is a personal right, unconnected with the ownership of goods or lands, and not embraced in the fullest exercise of the jus disponendi. Such obligations are not, in any sense, necessary, or even convenient, to the enjoyment of her property by the married woman. The true doctrine seems to me this: That to the extent that the feme does any act which enables her to use or enjoy her separate estate, the principles of equity will validate such act, but beyond this limit she is not discovert, and can not bind herself or her possessions.

Nor do I think that the principle which would remove from the present case, and from analogous cases, the disability of the married state, would be a wise or politic regulation. Few women have, or are likely to have, business habits or training. From their habits in life they are necessarily exposed to imposition. They must rely mainly upon others with respect to the legal effect of their acts. To give to such an inexperienced body of persons the right to indorse notes, to accept bills, and to become surety on bonds and other instruments, under the urgency of their husbands, or from the importunities of their relatives or friends, would not be a boon, but a calamity. In my opinion there is nothing in the general doctrines appertaining to the subject, that should compel this court to concede the existence of the power in question, nor is there any consideration of public policy which seems persuasive of such a concession. I agree, therefore, with the chancellor, as to the general principle, that a court of equity will not effectuate the contract of a married woman, not founded on a valuable consideration, binding her as surety for another.

But, although my examination of this subject has led me, with respect to the general principle involved, to the same conclusion as that reached by the chancellor, I find an ingredient in the case which has a controlling effect, and which appears to have escaped attention.

There are facts stated in this bill, and which, consequently, are admitted by this demurrer, which show that the female defendant had a personal interest in raising the money for which this note was given. The circumstances thus shown are these: That one Edwin Post, the payee of the note in question, held a mortgage against both these defendants, husband and wife, on certain lands of the husband; that the money secured by this mortgage was the sum of $10,000, and that this note was given to the mortgagee in part payment of the encumbrance, and in consideration of its assignment to one Pardee. The language of the bill in regard to these particulars is not as full or clear as it should be, but by a rational construction of it, the facts which I have stated sufficiently appear. The case, then, is this: A mortgage on the lands of the husband, is held against husband and wife, and they unite in giving a note to raise money to pay

off, in part, such encumbrance. Now, I think it is clear that in such a transaction a consideration moves to the wife, for she has a valuable, though contingent, interest in the property of her husband, which interest is encumbered by this mortgage, and the money borrowed was to be applied so as, in some degree, to exonerate such interest. In testing the wife's right to act as a feme sole, the only question is whether she is to derive any benefit from the transaction, for if such benefit is to accrue, her right to bind herself is unquestionable. In the absence of fraud or imposition, this court can not attempt to measure the adequacy of the interest which has induced her action. Whenever her property or rights are involved she has a competency to contract, and consequently must decide for herself as to the value of that which she will acquire by an outlay of her money, or as an equivalent for her engagements. The rule, of necessity, must be universal, that in all cases where the act of the feme ensues directly to her own benefit, and she, expressly or by implication, binds her estate, a court of equity will enforce such obligation. In the present case, as the act of Mrs. Elliott was beneficial to herself as well as her husband, it is not in her power to repudiate it. She does not stand here as a mere surety, but as a party having a purpose to subserve by entering into the contract in dispute. It is impossible to conjecture how far her own interest may have been the motive to her conduct, but it is enough to know that the effect of her contract was of possible benefit to her. As then the act of the married woman in giving the obligation sued on, was founded on some consideration valuable to herself, I can perceive no reason why the manifest justice of this case can not be reached by the enforcement of this contract.

On this latter ground I shall vote to reverse this decree, and to give to the complainant the relief prayed for.

For reversal: Beasley, C. J. Bedle, Clement, Dalrimple, Depue, Lathrop, Ogden, Scudder, Wales, Woodhull. 10.

For affirmance: None.

See also Bank of Commerce v. Baldwin, 14 Idaho 75, 93 Pac. 504, 17 L. R. A. (N. S.) 676 (1908).

HERSHIZER *v.* FLORENCE

39 Ohio St. 516 (1883).

Doyle, J.: If the defendant, Elizabeth Florence, was, at the date of the execution of the notes, the owner of the real estate described in the petition, or any part of it, as her separate property, the judgment of the district court was wrong. When a married woman, owning a separate estate, executes a promissory note, either for herself or as surety for her husband, the presumption is that she charges

her separate property with the payment thereof. Such presumption can not be overcome by testimony by the wife, that such was not her intention. Unless there are circumstances surrounding the transaction which show that such was not her intention, it is not material what her secret purpose was, and the presumption aforesaid will prevail.

The finding, therefore, by the district court, that she knowingly signed the notes as surety for her husband, is sufficient to bind her separate property (if she had any), notwithstanding the denial in her answer that by the execution of the notes she made such charge, or the averment that she did not, by word or deed, promise to pay said notes out of her separate estate, or pledge the same for such purpose. Avery v. Van Sickle, 35 Ohio St. 270; Williams v. Urmston, Id. 296.

Accord: Wicks v. Mitchell, 9 Kans. 80.

ALBERT MAYO AND ANOTHER *v.* HENRY P. HUTCHINSON AND ANOTHER

57 *Maine* 547 (1870).

Assumpsit on a promissory note of the following tenor:

$169 Winterport, September 19, 1868.

Sixty days from date, we jointly and severally promise to pay James H. Clark or order, one hundred and sixty-nine dollars with interest.
H. P. Hutchinson,
Witness, D. M. Belcher. C. E. Thayer.

The note was indorsed in blank.

The case was submitted to the presiding judge, each party reserving the right to except to any rulings in matters of law.

The presiding judge found that the second signer of the note was a married woman at the time she signed the note, and that she was only a surety on the note; and thereupon ruled as matter of law that the action was maintainable under the statutes of this state, both against the principal and surety; to which ruling the defendants alleged exceptions.

Appleton, C. J.: The legislatures of the state have been gradually enlarging the rights and extending the liabilities of married women. By an Act approved Feb. 23, 1866, c. 52, "The contracts of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole," etc. The wisdom or expediency of this act is a matter solely for the legislature. Its language is most general, and there can be no rea-

sonable doubt as to its meaning. A contract of suretyship is a lawful contract, and for a lawful purpose. It is valid and binding on a married woman. The married defendant may have been indiscreet in entering into it, but that is not the fault of the plaintiff. Almost all who sign as surety have occasion to remember the proverb of Solomon: "He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure." But they are nevertheless held liable upon their contracts, otherwise there would be no smarting, and the proverb would fail.

Exceptions overruled.

Judgment for the plaintiff.

Cutting, Walton, Dickerson and Danforth, J. J., concurred.

Accord: Major v. Holmes, 124 Mass. 108; Stone v. Billings, 167 Ill. 170, 47 N. E. 372.

LAWS OF PENNSYLVANIA (1893), P. 344.

"Hereafter a married woman may, in the same manner and to the same extent as an unmarried person, make any contract in writing or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise or enjoyment of the rights and powers granted by the foregoing section, but she may not become accommodation indorser, maker, guarantor or surety for another, and she may not execute or acknowledge a deed, or other written instrument conveying or mortgaging her real property, unless her husband join in such mortgage or conveyance."

CODE OF ALABAMA (1907).

Par. 4492. "The wife has full legal capacity to contract as if she were sole, except as otherwise provided by law."

Par. 4497. "The husband and wife may contract with each other, but all contracts into which they enter are subject to the rules of law as to contracts by and between persons standing in confidential relations; but the wife shall not, directly or indirectly, become the surety for the husband."

BURNS' REV. STAT. OF INDIANA (1914).

Par. 7855. "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner, and such contract, as to her, shall be void."

Note: Although statutes or court rules forbid attorneys acting as sureties on judicial bonds, nevertheless an attorney so signing will be held liable if no objection is taken to his signing as surety. Tessier v. Crowley, 17 Nebr. 207, 22 N. W. 734; Wallace v. Scoles, 6 Ohio 429.

Contra: Cothren v. Connaughton, 24 Wis. 134.

MAYBERRY, POLLARD & CO. *v.* BAINTON & BANCROFT.

2 Har. (Del.) 24 (1835).

By the court. Each partner has the power to charge the firm in all transactions within the scope and in the course of their business. This results from their partnership relation and the necessities of trade; for it is but reasonable that the confidence reposed in each

other as partners should be followed by mutual responsibilities for each other in all matters relating to their trade or business, and in which the public, when trading with them, rest on the common security of the firm. Thus one partner may bind the firm by drawing, accepting or indorsing bills or notes in the course of their business; for these are transactions common to almost every business or trade, and necessary to carry it on. But the guarantying the debts of others is not a necessary or common partnership transaction; it is altogether out of the course of the defendant's business in this case, and must have been known to be so by the plaintiffs when they accepted from Bainton a guarantee on behalf of the firm. In a transaction out of the scope of their business, and known to be so by the plaintiffs, is it not more reasonable that the other members of a firm should be bound by the act of one partner beyond his authority, without their knowledge or consent, or that the person guaranteed should be bound to see that the guarantee was known and assented to by all the partners who are to be bound by it. We apprehend the law to be now settled that one partner can not charge the firm by his guarantee of the debt of a third person without the assent of the others; but this assent may be shown as well by subsequent ratification as by previous command, or may be inferred from the conduct of the party, previous transactions of the same nature, or other circumstances tending to show a knowledge of, and acquiescence in, the transaction.

Accord: Duncan v. Lowndes, 3 Camp. 478; Osborn v. Stone, 30 Minn. 25, 13 N. W. 922; Avery v. Rowell, 59 Wis. 82, 17 N. W. 875; Seufort v. Gille, 230 Mo. 453, 131 S. W. 102, 31 L. R. A. (N. S.) 471.

Note: An insane person can not bind himself by a suretyship contract notwithstanding the creditor had no knowledge of his unsound condition of mind. Van Patton & Marks v. Beals & Hammer, 46 Iowa 62.

WINTERFIELD, APPELLANT, *v.* CREAM CITY BREWING COMPANY, RESPONDENT

96 *Wis.* 239, 71 *N. W.* 101 (1897).

Action was commenced by plaintiff against one Joseph Scheer, as principal, and the Cream City Brewing Company, as surety, for unpaid rent upon what is known as the Hotel Eagle, in the city of Milwaukee. The cause was tried by a referee. The referee found that plaintiff had leased the hotel in question to Scheer for the term of three years at an agreed rental of $120 per month, payable monthly in advance; that the defendant company gave a written guaranty for the payment of such rent; that the purpose of the guaranty was to provide a place for the sale of defendant's beer;

that at expiration of the lease there was due and unpaid seven months' rent, amounting to $840.

NEWMAN, J.: It is urged that to make such a contract of guaranty was not within the power of the corporation—that the contract was ultra vires. The rule, no doubt, is that a corporation can not bind itself to purposes which are foreign to those for which it was created. While this is true, the general rule, no doubt, is that, except as restrained by law, corporations have the implied power to make all such contracts as will further the objects of their creation, and their dealings in this regard may be like those of an individual seeking to accomplish the same ends. 4 Am. & Eng. Ency. of Law 245. They are not limited in law to the use of such means as are usual or necessary to the objects contemplated by their organization, but, where not restricted by law, may choose such means as are convenient and adapted to the end, though they be neither the usual means, nor absolutely necessary. Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co., 5 Wis. 173; Clark v. Farrington, 11 Wis. 306-322; North Hudson Mut. B. & L. Assn. v. First Nat. Bank, 79 Wis. 31. If the contract is within the general scope of the powers and purposes of the corporation, it will not be void, even if, in some particulars, it is in excess of those powers, unless, by reason of such excess, it is against public policy. Germantown F. M. Ins. Co. v. Dhein, 43 Wis. 420. The purpose of the defendant's organization was to manufacture and sell beer. Doubtless it was competent to make any contract, which was convenient and adapted to further that purpose which was not against public policy. No doubt it was within its competency to rent a place for the sale of its beer by its agents or servants. To rent a place where one of its customers should retail its beer would seem, in a similar manner, to further the purpose of its incorporation. At least, it is not clearly foreign to that purpose. The defendant owned the bar fixtures and furniture which was used by Scheer in the business. It was the defendant's beer which was sold there. The whole purpose was a scheme to make a market for the defendant's beer. The defendant patronized and promoted other similar establishments, in a similar way, in aid of the same general purpose. The scheme was germane to the purpose of the corporation, and not foreign to it. It was not ultra vires.

By the court. The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded with direction to confirm the report of the referee and to give judgment for the plaintiff according to its terms.

Accord: Timm v. Grand Rapids Brewing Co., 160 Mich. 371, 125 N. W. 357; Horst v. Lewis, 71 Nebr. 365, 98 N. W. 1046, 103 N. W. 460; Hess v. Sloane, 66 N. Y. App. Div. 522, 73 N. Y. S. 313; Central Lumber Co. v. Kelter, 201 Ill. 503, 66 N. E. 543.

THE BEST BREWING COMPANY *v.* KUNIGUNDA KLASSEN

185 *Ill.* 37, 57 *N. E.* 20, 50 *L. R. A.* 765, 76 *Am. St.* 26 (1900).

Mr. Justice Wilkin delivered the opinion of the court.

This is an action of debt upon an appeal bond. In a forcible entry and detainer proceedings before a police magistrate, in the city of Chicago, appellee, as plaintiff, recovered a judgment against Ruel G. Rounds for restitution of certain property. Rounds appealed to the county court of Cook county, filing an appeal bond as required by the statute. This bond was for $2,000, conditioned as provided by statute in such cases, and was signed by Rounds and appellant as his surety, the latter's execution of it being as follows:

"The Best Brewing Company of Chicago, (Seal.)
By Charles Hasterlik, Its President. (Seal.)"

In the county court judgment was again rendered for the plaintiff. Upon the failure of Rounds or the brewing company to comply with the terms of that judgment this proceeding was commenced in the circuit court of Cook county to recover on the appeal bond. In defense to the action, the brewing company, by its pleadings, denied that the bond was its deed; alleged that the making of the same, as to it, was unauthorized, and that such act was not within the power of the corporation. Issues were joined and a trial had by jury. At the close of plaintiff's evidence, and again at the close of all the evidence, a motion was made to instruct the jury to find for the brewing company, but these motions were overruled. The court then took the case from the jury by instructing it to render a verdict for the plaintiff, Klassen, for $1,321.50. This being done, judgment for that sum was duly entered, and appellant appealed to the appellate court for the first district, where the judgment below was affirmed, and it now brings the case here upon further appeal.

The chief error insisted upon by appellant is, that the circuit court held the bond sued on to be its act and deed, the contention being that the powers of the company, as a corporation, are limited by its charter to those which are express or implied; that its express powers are to "manufacture and sell beer, ale and porter and carry on a general brewing business in all its branches;" that the implied powers it possesses are only those which may be implied as necessary to carry into effect one or more of those expressed, and that the signing of this appeal bond comes under neither of these heads, but was an act ultra vires, and therefore not binding upon the corporation. Appellee insists, first, that the act was within the corporate power of appellant; or, second, although in excess of its corporate power, yet, having made the bond and enjoyed certain benefits arising therefrom, it is now estopped to make the defense of ultra vires.

The general rule is that a corporation can do only those acts which are within the scope of its charter, and if the signing of the bond in question as surety was an act not originally within the express or necessarily implied powers of the corporation it is void, and no subsequent act could make it valid by way of estoppel. It was so held in National Home Building Assn. v. Home Savings Bank, 181 Ill. 35, where the decisions of this court are reviewed, and we there said (p. 44): "If there is no power to make the contract there can be no power to ratify it, and it would seem clear that the opposite party could not take away the incapacity and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a contract by way of estoppel through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power." In that case it is also said: "The cases in this court where the corporation has been held to be estopped have been where the act complained of was within the general scope of the corporate powers.". In the case of Heims Brewing Co. v. Flannery, 137 Ill. 309, relied upon by appellee, the defense of ultra vires was invoked, and it was held the corporation was estopped to make that defense, inasmuch as it had enjoyed the benefit of the act; but there the act in question (which was the leasing of a building in which to conduct a saloon) was within the express power of the corporation.

We think the primary question here is not whether appellant has reaped a benefit from the act of becoming surety for Rounds upon the bond, but whether the act of signing it was within the scope of its corporate authority. The purpose of the corporation, as expressed in its charter, is to manufacture and sell ale, beer and porter and carry on a general brewing business. It would seem no acts could be more unlike than the doing of those authorized by the charter of the company and the signing of appeal bonds as surety. The instrument was executed in a suit not by or against the corporation, but by a third person against another to recover possession of a house. Prima facie the signing by the company of an appeal bond in such a suit was an act beyond the purpose for which it was organized, and consequently illegal. If it had been shown that it was executed clearly for the purpose of promoting or protecting its own business of brewing or selling beer, etc.—that is to say, if the act had been reasonably necessary to accomplish the end for which the corporation was formed—it would have been within the scope of the corporate power. But it can not be held that every act in furtherance of the interests of a corporation is intra vires. Many acts can be suggested which, though beneficial to the business of a corporation, are too remote from its general purposes to be deemed reasonably within its implied powers. What is and what is not too

remote must be determined according to the facts of each case. The rule has been stated to be: In exercising powers conferred by its charter, a corporation "may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate, unauthorized business." Clark v. Farrington, 11 Wis. 340.

In the case of Lucas v. White Line Transfer Co., 70 Iowa 541, where a corporation chartered for the purpose of doing a "general freight and transfer business and such other business as may not be inconsistent therewith" was sued upon a bond executed by it as surety with another corporation, the Supreme Court of that state said: "The plaintiff seeks to recover contribution from the corporation as cosurety on the bond of the brewing company, and claims (1) that the contract of suretyship was within the defendant's corporate powers; and (2) that if it were not within the defendant's corporate powers it has so acted on the contract as to now estop it from pleading ultra vires. * * * Whatever meaning may be attached to the language of the articles, it is quite certain it can not include the contract of suretyship in question. The simple act of going security for another is out of the line of the prosecution of any business. It is a mere accommodation, and it can not be assumed that the articles gave the officers of defendant any power to jeopardize its capital in any such venture." Quoting from other authorities, it is there further said: "It is no part of the ordinary business of commercial corporations, and, a fortiori, still less so of noncommercial corporations, to become surety for others. Under ordinary circumstances, without positive authority in this behalf in the grant of corporate power, all engagements of this description are ultra vires, whether in the indirect form of going on accommodation bills or otherwise becoming liable for the debts of others. Green's Brice's Ultra Vires, 252; Madison Plankroad Co. v. Watertown Plankroad Co., 7 Wis. 59." These authorities are clearly in point here, and lead to the conclusion that the act of appellant in signing this bond, instead of being the exercise of a delegated authority, was an attempt to execute powers not conferred upon it, either expressly or by implication.

In reaching this conclusion we have not overlooked the contention of appellee that the execution of the bond by appellant was in furtherance of its business, and that this fact has been found adversely to appellant by the appellant court and is therefore not open to review here. This position is based upon the assumption that Rounds was, at the time of the suit against him for possession of the premises, engaged in selling beer in the house and that appellant was furnishing him the beer; that the bond was executed on the part of the brewing company in order to enable him to retain possession of the property and continue his business therein and to make further purchases from the company. If all this were true, the benefits to

accrue to the corporation would certainly be of the most precarious and remote character. But we have searched the record in vain for evidence tending to support the assumption. The testimony wholly fails to prove, nor does it fairly tend to prove, that Rounds was engaged in any occupation calculated to promote the business of appellant, or that the business of the corporation was promoted or benefited, in any degree, by reason of the execution of the bond. Treating these as questions of fact material to the decision of the case, they are open to review in this court as a question of law, under the assignment of errors questioning the ruling of the trial court in refusing the motion of defendant for a peremptory instruction to find for it, made at the close of all the evidence.

Plaintiff below wholly failed to make out a cause of action against this appellant, and the circuit court improperly refused to instruct the jury to return a verdict in its favor. The judgment of the appellate court will accordingly be reversed.

Judgment reversed.

See also Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Western Maryland Railroad Co. v. Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 2 L. R. A. (N. S.) 887, 111 Am. St. 362; Coleman v. Eastern Counties Railway Co., 10 Beav. 1.

Note: A corporation has no authority to indorse or guarantee the commercial paper of another unless express power to do so is conferred by its charter, or unless such contract is reasonably necessary or is usual in the conduct of its business. Monarch v. Farmers & Traders' Bank, 105 Ky. 430, 49 S. W. 317, 88 Am. St. 310; Bank of Genesee v. Patchin Bank, 13 N. Y. 309; Dobson v. Moore, 164 Ill. 110, 45 N. E. 243, 56 Am. Rep. 184; National Park Bank v. German-American M. W. & S. Co., 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673; Bowen v. Needles National Bank, 87 Fed. 430.

A bona fide holder of such paper, who has taken it without notice that it was for accommodation, may enforce it against the corporation. Bank of Genesee v. Patchin Bank, supra; Jacobs Pharmacy Co. v. Southern Banking Co., 97 Ga. 573, 25 S. E. 171.

JOHN WINN *v.* FREDERICK C. SANFORD

145 *Mass.* 302, 14 *N. E.* 119, 1 *Am. St.* 461 (1887).

Contract against the surety upon the following bond, executed by Susan B. Winn as principal, and by the defendant as surety:

"Know all men by these presents, that we, Susan B. Winn, wife of John Winn, of Nantucket, as principal, and Frederick C. Sanford, of Nantucket, as surety, are holden and stand firmly bound unto John Winn, of Nantucket, above named, in the sum of three hundred dollars, to the payment of which to the said John Winn, or his executors, administrators, or assigns, we hereby jointly and severally bind ourselves, our heirs, executors and administrators. The condition of this obligation is such, that whereas, in a settle-

ment of differences between said John Winn and Susan B. Winn, it was agreed by said Susan B. Winn, and on her behalf, that she should give to said John Winn a bond, with surety, 'to release dower whenever requested, and make no further claim on said John Winn for any support or for any cause whatever.' Now therefore, if said Susan B. Winn shall, whenever requested, sign release of dower in any real estate of said John Winn, and shall make no further claim upon him for any support or for any cause whatever, then this obligation shall be void; otherwise it shall be and remain in full force and virtue."

Trial in the superior court, without a jury, before Thompson, J., who ruled, as a matter of law, "that the bond sued on can not be made the basis of any legal claim against the defendant; that, Mrs. Winn not being liable to her husband under it, the defendant is not liable;" and found for the defendant. The plaintiff alleged exceptions.

DEVENS, J.: It is true, as a general proposition, that the liability of a guarantor or of a surety is limited by that of his principal. But to this there are certain exceptions. Thus, where the principal is excused from liability for reasons personal to himself, and which do not affect the debt he has incurred or the promise he has made, the surety would not be entitled to the benefit of this excuse. In such case he is, in a certain sense, an independent promisor, and must perform his promise.

In Maggs v. Ames, 4 Bing. 470, the defendant had guaranteed the purchases made by a married woman incapable of making a contract; the question in the case was whether this guaranty should have been in writing; but it is assumed throughout, by court and counsel, that, if it had been in writing, the defendant would have been liable, although there could have been no liability on the part of the principal.

In a similar manner, where one becomes a surety for the performance of a promise made by a person incompetent to contract, his contract is not purely accessorial, nor is his liability necessarily ascertained by determining whether the principal can be made liable. Fraud, deceit in inducing the principal to make his promise, or illegality thereof, all of which would release the principal, would release the surety, as these affect the character of the debt; but incapacity of the principal party promising to make a legal contract, if understood by the parties, is the very defense on the part of the principal against which the surety assures the promisee. Yale v. Wheelock, 109 Mass. 502.

The bond in the case at bar is several, as well as joint. It appears from it that Mrs. Winn is the wife of the obligee, and it recites the agreement made between them. This agreement made by her is void, so far as the case now discloses, solely because of her incapacity to contract; but this should not release the defendant from

his engagement that she should perform the promise made by her. The defense which Mrs. Winn personally has, resulting from her situation, should not be open to him.

Nor do we perceive that any distinction can be made, as suggested by the defendant, between the promise of a married woman, which is void, and that of a minor, which is voidable. In either case, the surety assures the promisee against the incapacity of the principal to make a legal contract, whether it be more or less complete.

The cases in which it has been held that the coverture of the principal promisor at the time of making her promise will not discharge the surety, when such coverture was known to him, are numerous, and have arisen on many descriptions of contract. Smyley v. Head, 2 Rich. (S. Car.) 590; Kimball v. Newell, 7 Hill 116; Nabb v. Koontz, 17 Md. 283; Jones v. Crosthwaite, 17 Iowa 393; Weed Sewing Machine Co. v. Maxwell, 63 Mo. 486; St. Albans Bank v. Dillon, 30 Vt. 122; Davis v. Statts, 43 Ind. 103; Stillwell v. Bertrand, 22 Ark. 375.

Exceptions sustained.

JOHN HOLM *v.* EGBERT JAMIESON

173 *Ill.* 295, 50 *N. E.* 702, 45 *L. R. A.* 846 (1898).

Mr. Chief Justice Phillips delivered the opinion of the court:

On May 16, 1893, at Chicago, Ill., the Great Western Wire Works, by E. B. Filkins, treasurer, executed its note for $1,500, due sixty days after date, payable to itself, with six per cent. per annum interest after maturity, with power of confession of judgment, which note was indorsed, "Pay to the Central Trust and Savings Bank or order.—Great Western Wire Works, by E. B. Filkins." This note came to the hands of John Holm, who brought suit on the guaranty indorsed thereon, which is as follows: "I hereby guarantee the prompt payment of the within note.—E. A. Filkins, Egbert Jamieson."

The declaration alleges that upon the consideration that the Central Trust and Savings Bank would discount the note if the defendants would guarantee the prompt payment thereof, the defendants, for the consideration aforesaid, did guarantee the payment of the same to the Central Trust and Savings Bank. That bank, relying upon the guarantee of the defendants, discounted the note for the maker. After the guaranty of the note by Filkins and Jamieson, and its indorsement to the Central Trust and Savings Bank, that bank made a second indorsement thereon, as follows: "Pay to John Holm or order.—Central Trust and Savings Bank, by W. A. Paulsen." John Holm having brought suit on the guaranty indorsed on said note, against Egbert Jamieson, one of the guarantors, the latter appeared and filed a plea of general issue and a special plea, in which

it was set forth that William Holland, Merchant & Co. (a corporation), and other corporations and individuals, filed their bill of complaint against the Great Western Wire Works, Sadie H. Filkins, Edward A. Filkins, John Holm, Charles B. Morrow and Edward B. Filkins, in which it was averred that a note held by John Holm, and numerous other notes similarly executed, were fraudulent and void because of the fact that there was no authority in the treasurer to execute the same, and asking the cancellation of the judgment heretofore entered on said note of John Holm, and that said notes be declared fraudulent and void and be canceled and surrendered, and that judgment entered upon the said notes so executed be vacated and annulled. A decree was entered, on the hearing, in accordance with the prayer of the bill, and these facts by the special plea are averred. It is therein further averred that the contract of guaranty was written on paper on which said fraudulent and void promissory note was written, without any other or different consideration than the consideration for the said promissory note, which promissory note was declared to be fraudulent and void and decreed to be canceled, and the plea further averred that said decree was in full force.

It is insisted, first, by the appellant, that the decree set up in the plea by which the note on which the guaranty was indorsed and which was the basis of this action was not res judicata as to the defendant Jamieson, who was not a party thereto, and that that decree would be no bar to the prosecution of the suit on the guaranty indorsed on the note. The contention of appellee is, that as there is no debt or obligation due and owing to the appellant from the maker of the note, there is nothing due and owing to the plaintiff from the guarantors of the note; that as the maker of the note has been released and discharged by reason of the decree, and the guarantors have been deprived of their right of action over or subrogation as against the maker, there can be no liability as against the guarantors.

The note of the Great Western Wire Works having been executed by one without authority to execute such a note, as found in the decree set up in the plea, by that decree the note was declared for that reason fraudulent and void. To the proceeding by which this decree was so entered the appellant, John Holm, was a party, but the appellee, Egbert Jamieson, was not made a party thereto. We do not deem it necessary to enter into an extended discussion of the question as to the effect of the decree on parties and privies, and as to its being of no effect in binding persons who were not parties to the proceeding. The material question in this case to be determined is, what is the effect of the contract entered into by the defendants in guaranteeing payment of the note in the language they did, and how is that guaranty affected by a decree declaring the note itself on which the guaranty was written, and the payment of which was so guaranteed, void.

The language used in this guaranty, "I hereby guarantee the prompt payment of the within note," by its terms fixed the time at which the payment was to be made as of the date of the maturity of the note, and if the payment is not made by the maker within the time fixed in the note there is a breach of the guaranty, on which a liability exists, regardless of the fact that no steps have been taken against the principal. (Gridley v. Capen, 72 Ill. 11; Gage v. Mechanics' Nat. Bank, 79 id. 62.) A different rule exists when a defense is made to a note by reason of payment or a proper set-off. In such case a defense exists to the guarantor to the same extent as to the maker. A guarantor may make a contract which is collateral or one which is independent. This guaranty was an absolute undertaking that the maker would pay the note when due, and by the default of the principal an immediate liability existed. The undertaking of the guarantor was an independent contract, not resting on a necessity to exhaust a remedy against the maker, but by the terms used in the guaranty it was an undertaking to every subsequent holder that the instrument guaranteed was perfectly valid. By a guaranty of this character the guarantor undertakes to every subsequent holder that the names of the maker and previous indorsers are really in the handwriting of those to whom they respectively purport to belong; and this is carried to the extent that where a promise has been written upon the note itself, a person guaranteeing the payment of that note is bound, even though the names of prior parties, or some one of them, were in fact forged. (Veazie v. Willis, 6 Gray 90.) And it has been held that where a party to a certificate of deposit transferred it to another who had no connection with and was ignorant of the circumstances attending its origin, with the guaranty of the payment thereof, the guarantor was liable for the amount of the certificate, although it was void for matter dehors its face; and the court said the guaranty was, in effect, the representation that the instrument or claim was perfectly valid, as well as a promise to pay it. Purdy v. Peters, 35 Barb. 239.

Under the terms of this declaration the guaranty of the payment of the note by the signers to that guaranty was a condition precedent to its purchase by the Central Trust and Savings Bank, and it is further averred that its acceptance by that bank was because of its reliance on the guaranty. The contract thus made by the guarantors of the note was a promise as to its legality, and a liability which was not dependent on the prosecution of a suit against the maker of the note nor dependent on the validity or legality of the note. If the liability of a guarantor of commercial paper were dependent on extraneous circumstances not appearing on or suggested by the face of the instrument, and such guaranty might be rendered invalid because of fraud, forgery or other circumstances that might be set up as between the maker and the acceptor of the paper, it would practically destroy the value of the commercial paper and

unsettle business transactions, to the great detriment of public interests. The guaranty is a contract by which the validity of the instrument is represented, and is binding on the guarantor to the full effect of such representation. Such being the case, the fact that the Western Wire Works, whose name was appended to the note, was placed there by the treasurer without authority, thereby rendering its execution, as against the maker, invalid, did not change the liability of the guarantor on his contract, because its effect—the effect of the contract of the guarantor—was to represent the note as valid and binding. Such liability existing by reason of the guaranty was not defeated because of the want of authority of the maker of the note to sign the name of the corporation.

The decree entered declaring the note fraudulent and void because of the want of authority in the treasurer to sign the name of the corporation thereto did not constitute a defense in favor of the guarantors, and the plea was bad. The demurrer was properly sustained by the trial court. It was error in the appellate court to reverse the same.

The judgment of the superior court of Cook county is affirmed and that of the appellate court for the first district is reversed.

Judgment reversed.

See also Goodell v. Bates, 14 R. I. 65; Weare v. Sawyer, 44 N. H. 198; Lee v. Yandell, 69 Tex. 34, 6 S. W. 665; Gates v. Tebbetts, 83 Nebr. 573, 119 N. W. 1120, 20 L. R. A. (N. S.) 1000, 17 Am. Cas. 1183; Kyger v. Sipe, 89 Va. 507, 16 S. E. 627.

But if an infant on attaining his majority disaffirm the contract and return the consideration the surety will be discharged. Baker v. Kennett, 54 Mo. 82; Keokuk County Bank v. Hall, 106 Iowa 540, 76 N. W. 832.

A surety on the bond of a contractor can not set up as a defense the fact that the contract between the municipality and the contractor was ultra vires on the part of the municipality, in an action on the bond brought by a materialman who had furnished materials to the contractor. Bell v. Kirkland, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. (N. S.) 793, 120 Am. St. 621.

SECTION 3. CONSIDERATION

PAUL *v.* STACKHOUSE

38 *Pa. St.* 302 (1861).

Error to the common pleas of Bucks county.

This was an action of assumpsit, brought August 11, 1860, by Elizabeth Stackhouse to the use of Miles Shin against Morris Paul, on a promissory note. To a declaration in the usual form the defendant pleaded nonassumpsit.

On the trial the plaintiff offered in evidence the following promissory note:

WARMINSTER, 4th mo., 2d, 1857.

"One year after date I promise to pay to Elizabeth Stackhouse the sum of three hundred dollars, for value received, with lawful interest until paid.

"ELWOOD SPROGLE.
"MORRIS PAUL."

The interest for two years had been paid, as appeared by indorsement on the note.

The witness by whom the execution of the note was proved testified that he wrote the note, saw the money paid to Sprogle, and saw him sign the note; that Miss Stackhouse was not willing to let Sprogle have the money unless Morris Paul would go his security; that on the 5th of April, 1858, the witness took the note to Paul, telling him that Miss Stackhouse wanted his name on it as security; that Paul replied that he had promised Sprogle that he would go security on the note, but though he ought not to do it, he would do it; that he then signed his name to the note, saying he would pay her in a year or two; but that he did not say when he had made this promise to Sprogle.

Plaintiff then proposed to show by this witness that Elizabeth Stackhouse, at the time the money was borrowed, refused to let Sprogle have the money unless he would give security, and she agreed to take him, and that she gave the money and took the note with Sprogle's signature only, with the understanding between her and Sprogle that he was to procure the signature of Paul to it afterward as security.

WOODWARD, J.: The contract of suretyship rests necessarily upon a consideration that is valuable. The consideration may be in the form of an inconvenience to the party promised, or of an advantage to be gained by either the principal debtor or the surety, and it may be ever so slight; but in the one form or the other, a consideration which the law denominates valuable must be proved, or a surety can not be made legally liable. What is called a moral obligation is insufficient to support the promise of a surety. It is often said in the books, as was laid down by Gibbs, J., in Lee v. Muggeridge, 5 Taunton 36, that wherever there is a moral obligation to pay a debt, or perform a duty, a promise to perform that duty or pay that debt will be supported by the previous moral obligation, but it is believed that in all cases which may be cited in support of the rule, there was an original consideration beneficial to the party promising, and which might have been enforced on an implied promise, had it not been for some statute provision, or some positive rule of law, which, with a view to the general good, exempted the party from legal liability in the particular instance. See the cases cited in note to Edwards v. Davis, 16 Johns. 284. See also Mills v. Wyman, 3 Pick. 207; Smith v. Ware, 13 Johns. 257, and C. J. Gibson's observations in Kennedy v. Ware, 1 Barr 445.

Many of these cases have reference to the action of assumpsit against the original or principal promisor; but they apply all the more forcibly to the action when brought against a surety, for his liabilities are measured by no equitable or moral standard, but only by rules of sheer law.

The plaintiff in error was not to be holden, therefore, on the ground of a prior moral obligation, and the judgment against him can not be supported on that footing. Still, however, we think it sustainable. Taking the evidence contained in the first and second specifications of error, it may, without undue license, be treated as Paul's request to Miss Stackhouse, to lend Sprogle the money in question. He promised Sprogle he would go his security, and this was an authority to the latter to say so to the creditor. Sprogle communicated it to Miss Stackhouse, and she let Sprogle have the money on the faith of Paul's promise thus sent to her. What was this but saying, Let Sprogle have the money, and I will be his surety for the repayment? The money was loaned, and a note taken at a year, signed only by Sprogle. Three days after the year was up Paul signed it. There was his contract fully completed; but completed, it is said, on a consideration that was past and executed.

It is true, as a general rule, that the consideration which binds a surety must be executory; but where the thing was done at the instance or request of the surety, a past consideration binds him. Pitman, in his excellent little treatise on Principal and Surety, p. 57, Law Library, vol. 40, states the rule in regard to past considerations by the instance of the old case of Hunt v. Bate, 3 Dyer 272, where A.'s servant was arrested in London for a trespass, and J. S., who was well acquainted with the master, bailed the servant, and afterward A., for his friendship, promised to save him harmless, and J. S. was compelled to pay the condemnation money, it was held that an action did not lie upon A.'s promise, because the bailing, which was the consideration, was past, and executed before. A consideration, therefore, says this writer, which is executed, is not sufficient to support a subsequent promise, unless, indeed, the act was done at the request of the party promising, for then the promise is not a naked one, but couples itself with the precedent request, and is therefore founded on a good consideration. Some of the cases he cites in support of the latter branch of the rule do not sustain the proposition; but others do. It was said by Mr. Justice Wilmot, in 1765, in Pillans & Rose v. Mierop & Hopkins, 3 Burrows 1671, that it was then settled that where the act is done at the request of the person promising, it will be a sufficient foundation to graft the promise upon. He pronounced many of the old cases, and some of the modern ones that were inconsistent herewith, to be "strange and absurd," and declared that the rule as to past considerations "has been melting down into common sense of late times."

It is necessary to lay a precedent request in cases where the consideration was executed and bygone at the time of the promise; 1 Saund. Rep. 264a, and the cases in notes. Possibly the plaintiff's narr. is defective in this respect, but as a copy of it has not been furnished us, we will not presume it defective after verdict and judgment.

On this ground, therefore, that the money was loaned to Sprogle at the instance and request of Paul, we hold him bound by his subsequent promise. The consideration for his promise, though past, was a continuing and valuable consideration and his signature to the note was a completion and full execution of the promise upon that consideration. It is not essential that a consideration move to the surety—it is sufficient if the principal derive a benefit from the promise.

This is the ground upon which the judgment in Hemphill v. McClimans, 12 Harris 367, ought to have been placed. The son of a married woman contracted with builders for the stonework of a grist-mill. After part of the work had been done, they refused to proceed further without security for payment, and Mrs. Hemphill then promised to see them paid. They went on and finished the work; she became discovert, and after that renewed her promise to pay. Her first promise was void because of the disabilities of marriage, and her promise after discoverture was resisted for want of consideration. A majority of the court insisted on resting her legal liability on her moral obligation, and that has made the case a mischievous precedent. A moral obligation, no doubt, there was to pay for labor which she had induced others to expend for the benefit of her son, but like most moral obligations it was enforceable in foro conscientiae, rather than in a court of law. The law compels nobody to become surety for another. The relation of principal and surety rests wholly in contract, and the law enforces contracts only that are founded in some consideration. But the work having been finished at Mrs. Hemphill's instance, her subsequent promise, when she became able to contract, should have been coupled with the precedent request, and thus a valid consideration, though past and bygone, would have been found.

Accord: Laingor v. Lowenthal, 151 Ill. App. 599.

JOSEPH BICKFORD v. DAVID N. GIBBS ET AL.

8 *Cush. (Mass.)* 154 (1851).

Shaw, C. J.: Assumpsit to recover the amount of a note given by one May, and guaranteed by the defendants.

The exception is also taken that as the guaranty was a contract collateral to the note, a distinct consideration should be proved. There would be force in this objection, had the guaranty been made after the note had been made, delivered and received as a complete contract. But when the guaranty is made on the note before its delivery by the maker to the promisee it must be deemed to be done for the benefit of the maker, to add to the strength of the note and to induce the promisee to take it and advance his money on it; and no other consideration is necessary than the credit thus given to the maker.

Accord: Joslyn v. Collinson, 26 Ill. 61.

SIMMANG v. FARNSWORTH

24 *S. W.* 541. *Court of Civil Appeals of Texas* (1893).

Fly, J.: Appellee, who was plaintiff below, sued appellant on a note for $200, signed by him and one John Cavanaugh. Appellant answered that he had signed the note as a surety some time after the consideration had passed between appellee and Cavanaugh, and that there was no consideration passed to him for signing said note. The evidence shows that the note was executed on December 19, 1888, and was at that time only signed by Cavanaugh, and, thus signed, was delivered to appellee. Appellant was not present at this time. The note was given for a one-third interest in machinery, the other interests being owned by appellee and one Charles Simmang. Appellant did not sign the note until in January, 1889, after the machinery was in running order. It was handed to appellant by Cavanaugh, who requested him to sign it. There is but one point to consider in order to arrive at a conclusion. If the consideration had not passed between Cavanaugh and Farnsworth at the time that the note was signed by appellant, then the appellant is responsible, and the judgment of the lower court is correct, and should not be disturbed; if, however, the consideration had passed and become executed before the appellant signed the note, then his signing was no part of the inducement to the creation of the original debt as evidenced by the note, and appellant is not responsible. 1 Brandt, Sur.

(2nd ed.), p. 20, par. 17; Baker v. Wahrmund, 23 S. W. 1023 (decided by this court at this term). There must be some consideration moving to the principal alone, contemporaneous with or subsequent to the promise of the surety. If, after the original consideration has moved between the principal and creditor, the surety signs upon a new consideration moving from the creditor to the principal, this is sufficient. Also where a promise is made at the time the note is executed by the principal that the name of the surety will be obtained to the note, and the surety afterward signs the note, the consideration would be legal and valid. But where the consideration between the creditor and principal had passed and become executed before the contract of the surety is made, and such contract was no part of the inducement to the creation of the original debt, the surety would not be bound. Jackson v. Jackson, 7 Ala. 791; 1 Brandt, Sur. (2nd ed.), p. 20, par. 17. The note was executed by Cavanaugh on December 19, 1888, at the time of the delivery of the machinery at the depot in San Antonio, and the note was delivered to Farnsworth, who put it in his pocket. The note was given for one-third interest in the machinery, and the putting up of the machinery did not seem to be a part of the consideration; but, if it was, it was in complete running order when appellant signed the note. The note shows that the consideration for its execution was an interest in machinery furnished by Farnsworth. There was no agreement at the time that Cavanaugh signed the note that appellant's name would be secured to the note, and when he signed it the consideration was fully executed and the debt had been created without the inducement of appellant's suretyship. There was no consideration for his signature.

Accord: Pratt v. Hedden, 121 Mass. 116; Ludwick v. Watson, 3 Ore. 256; Thomas v. Williams, 10 Barn. & Cr. 664.

WILLIAMS ET AL. *v.* PERKINS

21 *Ark.* 18 (1860).

Mr. Justice Compton delivered the opinion of the court.

This was an action of debt, at the suit of the defendant in error—who was plaintiff below—on a writing obligatory which was as follows, to wit:

"$1,894 47-100. One day after date we, or either of us, promise to pay to Nicholas T. Perkins, or order, eighteen hundred and ninety-four 47-100 dollars; it being a balance due for the net proceeds of seventy-seven bales of cotton which Williams & Parker sold for him

in New Orleans, on the 25th day of May last, with interest from that time. Witness our hands and seals, this 2d day of July, 1846.

"WILLIAMS & PARKER,
"O. B. PARKER, (Seal.)
"WM. T. WILLIAMS, (Seal.)
"GIDEON J. WILLIAMS. (Seal.)"

Gideon J. Williams pleaded separately to the action: 1st. That the writing obligatory declared on was signed and sealed by him without any consideration. 2d. Payment. Similar pleas were filed by William T. Williams, who also pleaded separately.

The cause was submitted to a jury, who returned a verdict for the plaintiff, and judgment was rendered accordingly.

The evidence shows that the writing obligatory was signed by Williams & Parker and O. B. Parker, as principal obligors, and Gideon J. Williams and William T. Williams, as sureties. When the instrument was signed by the principal obligors it was understood between them and Perkins, the payee, that the sureties were to sign it also—they being then absent. Perkins took the instrument and afterward procured the signatures of the sureties. There is no controversy as to the consideration which passed from the payee to the principal obligors. But it is insisted that, at the time the sureties signed the writing obligatory, the consideration upon which it was founded was wholly past or executed, and was, therefore, as to them, insufficient.

Under our statute this defense may be made, though the instrument be under seal. Gould's Dig., ch. 133, § 75.

The general rule is that a past or executed consideration is not sufficient to sustain a promise founded upon it, unless the consideration, though past, was done or performed at the request of the party promising. Without such previous request a subsequent promise has no legal validity; because the consideration being entirely completed and exhausted, it can not be said that it would not have been made or given but for a promise which is subsequent and independent. But where the consideration and the promise founded upon it are simultaneous, and the whole agreement is completed at once; or where the consideration is to do a thing in the future, the promise rests on a sufficient foundation, and is binding on the party who makes it. To illustrate: If one lends money to another and, at a subsequent time, a third party, who did not request the loan, and is not benefited by it, promises to see that it is paid, such promise is void, because no consideration passes from the promisee to the promisor. But if the promisor requests the loan, or if his promise is made previous to the loan, or at the same time, then it will be supposed that the loan is made because of the promise, which is a sufficient consideration to bind the promisor.

The consideration for the promise of a surety may be that upon which the liability of the principal debtor is founded. The rule

seems to be this: If the debt or obligation of the principal debtor is already incurred previous to the undertaking of the surety, then there must be a new and distinct consideration to sustain the promise of the surety. But if the obligation of the principal debtor be founded upon a good consideration, and, at the time it is incurred, or before that time, the promise of the surety is made, and enters into the inducement for giving credit, then the consideration for which the principal debt is contracted is regarded as a valid consideration, also, for the undertaking of the surety. Par. on Contracts, 391, 392, 496, 497; Burge on Suretyship, 13, 14, 36; Jackson's Admr. v. Jackson et al., 7 Ala. (N. S.) 794; Baily v. Croft, 4 Taunton R. 611.

It results, from an application of these principles to the evidence adduced, that the proposition of the plaintiffs in error is not maintainable. Although the payee took the writing obligatory at the time it was executed by the principal obligors, and held it for some length of time—how long does not appear—before the signatures of the sureties were procured, still, it does not follow that it was first made and signed by the principal obligors and accepted by the payee as a complete contract, and afterward, at another time, the contract of the sureties was made as a distinct and independent transaction; because, at the time it was signed by the principal obligors it was expressly understood between them and the payee that the sureties would also sign it.

That the payee did not accept the writing obligatory as a complete contract until the signatures of the sureties were obtained is an irresistible conclusion from the evidence. Although the signatures of the principal obligors were procured at one time, and those of the sureties afterward, nevertheless, in contemplation of law, their promises were contemporaneous, and formed a part of one and the same general transaction; and the same consideration which supports the promise of the one also supports that of the other. Hence, the sureties were clearly liable upon the instrument sued on.

Accord: McNaught v. McClaughry, 42 N. Y. 22, 1 Am. Rep. 487; Moies v. Bird, 11 Mass. 436, 6 Am. Dec. 179; Pauly v. Murray, 110 Cal. 13, 42 Pac. 313.

CREARS *v.* HUNTER

19 *L. R. Q. B. D.* 341 (1887).

Appeal from the order of the Queen's Bench Division (Day and Wills, J. J.) setting aside the verdict and judgment for the plaintiff at the trial.

The facts in substance appeared to be as follows:

The action was on a promissory note, the defence being that there was no consideration for the making of the note by the defendant.

The defendant's father,* since deceased, had, before the defendant came of age, borrowed a sum of 200L. from the plaintiff, promising that his son, the defendant, when of age, would become surety for the debt. In 1877, the defendant being then of age, the plaintiff brought a promissory note stamp to the defendant's house, where the defendant then was, and the promissory note now sued upon was then drawn up and signed by the defendant's father and the defendant. By such note they jointly and severally promised to pay to the plaintiff or order "the sum of 200L., being money lent, with interest on the same from Martinmas last past half-yearly at the rate of 5 per cent. per annum." There was no evidence as to anything being said by the parties in relation to the signing of the note. Interest had been paid upon the note. It appeared that on several occasions such interest was paid in the defendant's presence, and the receipts for such payments of interest were made out to the defendant's father and the defendant jointly. The principal being still due, the plaintiff brought his action on the note against the defendant Hunter and his father's executor.

The learned judge at the trial, A. L. Smith, J., appeared in substance, to have told the jury that, if the note was signed by the defendant in order that the plaintiff might give time to his father, and the plaintiff did give time, there would be a good consideration for the making of the note by the defendant, and he left it to the jury to say whether there was such consideration.

The jury found for the plaintiff.

The Divisional Court set aside the verdict on the ground that there was no evidence of consideration, and entered judgment for the defendant.

Lord Esher, M. R.: In this case the defendant's father had borrowed money of the plaintiff, and was actually liable to pay the amount so borrowed. The plaintiff purchased a promissory note stamp and went with it to the house of the defendant's father, and there found the defendant's father and the defendant, who was at that time under no obligation whatever to the plaintiff. A promissory note was drawn up, which does not, it is true, on the face of it provide for any delay in payment of the amount due by the father, because the father's liability on the note arose immediately after it was signed, if the plaintiff had chosen to sue on it. The note does nevertheless indicate on the face of it that, though there was no binding agreement to forbear, the parties did contemplate that the note might not be sued on for some time, because provision is made for the payment of interest half-yearly by the son jointly with the father. It may be true that there was no evidence of any request in

*The executor of the father was joined as a defendant in the action, but had put in no defense; and for convenience sake the son is referred to throughout the report as if he had been the sole defendant.

express terms by the son that the plaintiff would forbear to sue the father, but what was the substance of the transaction contemplated in the minds of the parties? Was not the understanding obviously that, if the plaintiff would forbear to sue the father, the defendant would become liable on the note? I take it to be undoubted law that the mere fact of forbearance would not be a consideration for a person's becoming surety for a debt. It is quite clear on the other hand that a binding promise to forbear would be a good consideration for a guarantee. The question is whether, if the guarantor requests the creditor to forbear from suing and the creditor on such request, although he does not at the time bind himself to forbear, does in fact afterward forbear to sue, there is a good consideration for the guarantee. It seems to me that it was laid down in Oldershaw v. King* that there would in such a case be a good consideration, and I do not think that any of the cases cited to us is really to the contrary. Earle, J., there said: "Looking at the whole letter and the circumstances under which it was written, and considering the importance of further advances, I come to the conclusion that the consideration contemplated was that further advances should be made and time given by the creditor before he would press for payment of the existing debt. Though the contract did not bind the creditor to make further advances or to give time, unless he chose to do so, it is clear that, if he did make the advances and did give time, that which was contingent at the time when the instrument was written became an absolute and binding contract." It clearly follows from what he there says that, if at the request of the guarantor the creditor does in fact forbear, there is a sufficient consideration to bind the guarantor, who has promised to pay the debt. It was argued that the request to forbear must be express. But it seems to me that the question whether the request is express or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances, it is the same as if there were an express request. The question is, therefore, whether there was sufficient evidence in this case to entitle the jury to infer that the understanding between the plaintiff and the defendant was that, if the plaintiff would give time to the father, the defendant would make himself responsible. I am of opinion that there was evidence to go to the jury that what the parties really understand in their minds was that, if the plaintiff would give the defendant's father time to turn round, the defendant would guarantee the payment of the principal in the end and in the meantime interest at the rate of 5 per cent. per annum half-yearly. I not only think that there was evidence of such an understanding, but I entirely agree with the inference drawn by the jury. I can not see any other reasonable explanation of the transaction than that

*2 H. & N. 399, 517.

the understanding was as I have said. For these reasons I think that the verdict and judgment at the trial were right, and that the decision of the Divisional Court must be reversed.

Lopes, L. J.: In this case the question is whether there was evidence of a consideration for the making of this note by the defendant. The law appears to be that a promise to forbear is a good consideration, but also that actual forbearance at the request, express or implied, of the defendant would be a good consideration. Taking the latter of these two alternatives, it is undisputed that there was actual forbearance from suing in this case. That by itself would not be sufficient; such forbearance must have been at the request, express or implied, of the defendant. There is no evidence here of any express request. It seems, however, clear that there is evidence of an implied request, and I think the jury were justified in finding that there was such a request. Unless it were to procure forbearance, it is inconceivable why the defendant should have signed the note at all. The case is strengthened when it is borne in mind that the note provides for the payment of interest half-yearly by the father and son jointly, thus clearly indicating to my mind that forbearance was contemplated at the request of the son. For these reasons I think the judgment of the court below should be reversed.

Appeal allowed.*

BENJAMIN B. STRONG, APPELLANT, *v.* LOUISA A. SHEFFIELD, RESPONDENT

144 *N. Y.* 392, 39 *N. E.* 330 (1895).

This was an action upon a promissory note.

The facts, so far as material, are stated in the opinion.

Andrews, Ch. J.: The contract between a maker or indorser of a promissory note and the payee forms no exception to the general rule that a promise, not supported by a consideration, is nudum pactum. The law governing commercial paper which precludes an inquiry into the consideration as against bona fide holders for value before maturity, has no application where the suit is between the original parties to the instrument. It is undisputed that the demand note upon which the action was brought was made by the husband of the defendant and indorsed by her at his request and delivered to the plaintiff, the payee, as security for an antecedent debt owing by the husband to the plaintiff. The debt of the husband was past due at the time, and the only consideration for the wife's indorsement, which is or can be claimed, is that as part of the transaction there was an agreement by the plaintiff when the note was given to

*The opinion of Lindley, L. J., is omitted.

forbear the collection of the debt, or a request for forbearance, which was followed by forbearance, for a period of about two years subsequent to the giving of the note. There is no doubt that an agreement by the creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential that the creditor should bind himself at the time to forbear collection or to give time. If he is requested by his debtor to extend the time, and a third person undertakes in consideration of forbearance being given to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforcible agreement to do so, his acquiescence in the request, and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for the collateral undertaking. In other words, a request followed by performance is sufficient, and mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be bound, except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested. (Morton v. Burn, 7 A. & E. 19; Wilby v. Elgee, L. R., 10 C. P. 497; King v. Upton, 4 Maine 387; Leake on Con. p. 54; Am. Lead. Cas. vol. a, p. 96 et seq. and cases cited.) The general rule is clearly, and in the main accurately, stated in the note to Forth v. Stanton (1 Saund. note 6). The learned reporter says: "And in all cases of forbearance to sue, such forbearance must be either absolute or for a definite time, or for a reasonable time; forbearance for a little, or for some time, is not sufficient." The only qualification to be made is that in the absence of a specified time a reasonable time is held to be intended. (Oldershaw v. King, 2 H. & N. 517; Calkins v. Chandler, 36 Mich. 320.) The note in question did not in law extend the payment of the debt. It was payable on demand, and although being payable with interest it was in form consistent with an intention that payment should not be immediately demanded, yet there was nothing on its face to prevent an immediate suit on the note against the maker or to recover the original debt. (Merritt v. Todd, 23 N. Y. 28; Shutts v. Fingar, 100 id. 539.)

In the present case the agreement made is not left to inference, nor was it a case of request to forbear, followed by forbearance, in pursuance of the request, without any promise on the part of the creditor at the time. The plaintiff testified that there was an express agreement on his part to the effect that he would not pay the note away, nor put it in any bank for collection, but (using the words of the plaintiff) "I will hold it until such time as I want my money, I will make a demand on you for it." And again: "No, I will keep it until such time as I want it." Upon this alleged agreement the defendant indorsed the note. It would have been no violation of the

plaintiff's promise if, immediately on receiving the note, he had commenced suit upon it. Such a suit would have been an assertion that he wanted the money and would have fulfilled the condition of forbearance. The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what was done under it. It was a case of mutual promises, and so intended. We think the evidence failed to disclose any consideration for the defendant's indorsement, and that the trial court erred in refusing so to rule.

The order of the general term reversing the judgment should be affirmed, and judgment absolute directed for the defendant on the stipulation, with costs in all courts.

All concur, except Gray and Bartlett, J. J., not voting, and Haight, J., not sitting.

Ordered accordingly.

WILLIAM MECORNEY *v.* DOUGLAS N. STANLEY

62 *Mass.* 85 (1851).

This was an action of assumpsit on a promissory note, bearing date the 20th of December, 1848, payable to the plaintiff or order on demand, subscribed by John E. Stanley; and on which the defendant's name was indorsed in blank. The trial was before Hoar, J., in the court of common pleas.

The declaration contained four special counts; in the first of which the defendant was sought to be charged as an original promisor; and in the others as a guarantor. The consideration alleged in the three last counts was a forbearance to sue John E. Stanley.

It was in evidence for the plaintiff, that the defendant, on the 19th of February, 1849, paid a part of the note; that at the time of making the payment he said that he had signed a note for his brother John E. Stanley; that he had become surety for his brother to the plaintiff, who furnished him with goods and thereby helped him; that he, the defendant, was secured, and held a bill of sale or a mortgage of the goods and effects of John E. Stanley to secure him; and that the plaintiff was pressing him for payment.

The defendant then introduced evidence tending to show, that he did not put his name on the note until the 14th of February, 1849. The defendant also put in evidence the deposition of Horace Mecorney, who testified, that, in the latter part of February, or the early part of March, 1849, the plaintiff called on John E. Stanley

to pay or secure a note which the plaintiff held against him; that John replied, that he would try to get his brother Douglas, who was in the next room, to sign with him, and asked the plaintiff if he would; that John then went into the room where his brother was, and both came together, immediately, into the room where the witness and the plaintiff were; that the defendant then said to the plaintiff, that if he would not ask him for payment nor call on him for it in less than six months, he would sign with his brother; that the plaintiff then said he would not, and they made a writing to that effect, which the plaintiff signed; and that thereupon the defendant indorsed his name on the note.

The plaintiff, upon these facts, insisted, that the defendant was liable on the first count in the declaration, if not on the others. But the judge ruled and instructed the jury, that if the defendant did not put his name on the note at the time it was given, but at the time and in the manner stated in the deposition of Horace Mecorney, he was not liable on the first count; and that to sustain the three last counts, it was not sufficient for the plaintiff to prove a forbearance to sue John E. Stanley; but that he must prove an agreement, binding upon the plaintiff, to forbear to sue John E. Stanley; that an agreement not to sue the defendant would not be sufficient; and that there seemed to be no sufficient evidence in the case, from which the jury could infer an agreement to forbear to sue John E. Stanley, leaving that question, however, to the decision of the jury.

The jury returned a verdict for the defendant, whereupon the plaintiff alleged exceptions.

Bigelow, J.: It is very clear that the plaintiff could not recover against the defendant on the first count charging him as an original promisor, because the evidence proved that the defendant's name was not put on the back of the note until several weeks after the note was given. Union Bank of Weymouth and Braintree v. Willis, 8 Met. 504; Benthall v. Judkins, 13 Met. 265.

As the defendant did not partake in the original consideration of the note by becoming a party to it, at its inception, the plaintiff was bound to show a valid consideration for the undertaking of the defendant. For this purpose he relied on his last three counts, and offered evidence tending to show a forbearance to sue John E. Stanley, the original promisor. But it did not appear that there was any agreement to give time to the original promisor. On the contrary, his liability to pay the note on demand remained unchanged. The only consideration therefore for the defendant's promise was the pre-existing debt of John E. Stanley, with which the defendant had no concern. But a mere forbearance to sue, without any promise or agreement to that effect by the holder of a note, forms no sufficient consideration for a guaranty. It is a mere omission on the part of the creditor to exercise his legal right, to which he is not bound by any promise, and which right he may at any moment

and at his own pleasure enforce. There being in this case no agreement to forbear to sue, the creditor was not hindered or delayed. He could have brought his suit against the promisor at any time, so that he sustained no injury or inconvenience sufficient to constitute a consideration for the promise; and, on the other hand, the original debtor received no benefit or advantage whatever, because he was liable to be sued at any moment, and so the consideration fails as to him. There was no damage to the creditor or benefit to the debtor upon which the consideration of a promise can rest. It is not therefore true, as a proposition of law, that forbearance to sue a third person is, of itself, a sufficient consideration for a promise; and the court would have erred, if they had complied with the plaintiff's request, and given any such instruction to the jury. To constitute a forbearance to sue a third person a good consideration, it must have been pursuance of an agreement to forbear. In such a case, the injury to the promisee and the benefit to the debtor both concur in making the consideration valid. It is undoubtedly true, that an actual forbearance to sue may often, in connection with other facts, be evidence of an agreement to forbear, and, as such, form a good consideration for a promise. Walker v. Sherman, 11 Met. 170; Breed v. Hilhouse, 7 Conn. 523. But this is a very different proposition from that contended by the plaintiff, that forbearance of itself, without any promise, is a good consideration. Byles on Bills, 90, note; Crofts v. Beale, 11 C. B. 172. * * *

Exceptions overruled.

McCANNA & FRASER CO. *v.* CITIZENS' TRUST & SURETY CO. OF PHILADELPHIA

76 *Fed.* 420, 35 *L. R. A.* 236 (1896).

Before Dallas, Circuit Judge, and Butler and Wales, District Judges.

Butler, District Judge: The suit is on a surety bond given by the defendant to the plaintiff—the latter being a corporation of Wisconsin. The bond recites that the plaintiff has appointed S. Ridgway Kennedy its manager, and that he is to enter into its service accordingly in Philadelphia, and then stipulates that the defendant will reimburse the plaintiff to the extent of $7,000 for such pecuniary loss, if any, as may be sustained by said employer by reason of the dishonesty of the employe, amounting to embezzlement or larceny, in connection with his duty as manager of the plaintiff's business.

An act of assembly of the commonwealth of Pennsylvania, approved April 22, 1874, requires every foreign corporation undertaking to do business in the state of Pennsylvania to establish an

office here, and to appoint an agent for the transaction of business; and the second section declares that it shall not be lawful for any such corporation to do any business in this commonwealth until it shall have filed in the office of the secretary of this commonwealth a statement under the seal of the corporation and signed by the president and secretary thereof showing the title and object of the corporation, the location of its office or offices, and the name or names of its agent or agents, etc.

The third section declares that any person or persons, agent or agents, officer or employe of such foreign corporation who shall transact any business in this commonwealth without compliance with the provisions of the act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment, etc.

The plaintiff did not comply with the second section, and consequently its business transacted here was unlawful. The construction and effect of the statute have several times been considered by the Supreme Court of the state (whose decisions in this regard are binding on us) and that court has held that the transaction of business in Pennsylvania by a foreign corporation, under such circumstances, and all contracts pertaining to it, are unlawful. In Lasher v. Stimson, 145 Pa. St. 30, it is said: "These terms are not onerous, or in conflict with any constitutional provision or rule of public policy. But they are clearly prohibitory, and they indelibly stamp as unlawful any business transaction within the state, by a foreign corporation which has not complied with them. It is only by its observance of them that it can have a legal existence for business purposes within this jurisdiction, or aquire contractual rights which our courts will recognize. Thorne v. Insurance Co., 80 Pa. St. 15."

It will be observed that the court in its construction adopts the principles of the case of Thorne v. Insurance Co., in which it was held that, when a foreign insurance company has not complied with the act under which alone it is authorized to transact business in Pennsylvania, there can be no recovery by the company upon a bond given by its agent, with sureties, conditioned for paying over moneys of the company received by him. Johnson v. Hulings, 103 Pa. St. 498, is to the same effect. Thus it results that the bond in suit must be regarded as taken to protect the plaintiff while engaged in prosecuting its business in violation of law. It is substantially a contract to protect the plaintiff against loss while engaged in violating the law. It requires no argument to demonstrate that such a contract is invalid. The point made by the plaintiff's counsel, that inasmuch as the appointment of the agent was lawful the bond taken as security for his conduct is not liable to the objection urged, is ingenious, but is not sound. The conduct contemplated relates to his prosecution of the unlawful business stated. It is true that the defendant may not have known or supposed that the business would be undertaken without compliance with the statute. It is immaterial,

however, what the defendant's understanding was in this respect. It must be inferred that the plaintiff contemplated a disregard of the law from the beginning; inasmuch as he subsequently violated it. In any view that can be taken of the subject the fact remains that the plaintiff is seeking to enforce a contract entered into for the purpose of securing it in conducting a business forbidden by law; and such a contract is necessarily void.

The judgment is affirmed with costs.

Accord: Rouse v. Mohr, 29 Ill. App. 321 (note given to compound a felony); Leckie v. Scott, 10 La. 412 (note given for gambling debt); Hook v. White, 201 Pa. 41, 50 Atl. 290 (in fraud of creditors).

See also Ramsey v. Whitbeck, 183 Ill. 550, 56 N. E. 322; Board of Education v. Thompson, 33 Ohio St. 321; Serrill v. Wilder, 77 Ohio St. 343, 83 N. E. 486.

SECTION 4. INCOMPLETED CONTRACTS OF SURETYSHIP

JAMES NEIL, PLAINTIFF IN ERROR, *v.* RICHARD P. MORGAN, SIDNEY S. MORGAN AND PETER W. PECKHAM, DEFENDANTS IN ERROR

28 *Ill.* 524 (1862).

This was an action of debt, commenced in the Circuit Court of Peoria county, upon a bail bond, which said bond is as follows:

"Know all Men by these Presents, that we, Richard P. Morgan, of the county of Cook and State of Illinois, are held and firmly bound unto John L. Wilson, sheriff of Cook county, in the state of Illinois, in the sum of four thousand dollars, lawful money of the United States, for the payment of which, well and truly to be made, to the said John L. Wilson, sheriff as aforesaid, or his successors in office, executors, administrators or assigns, we hereby jointly and severally bind ourselves, our heirs, executors and administrators. Witness our hands and seals, this 17th day of April, eighteen hundred and fifty-seven.

"The condition of this bond is such, that whereas James Neil has lately sued out of the Circuit Court of Peoria county a certain writ of capias ad respondendum, in a certain plea of trespass on the case on promises, against Richard P. Morgan, returnable to the next term of the said court, to be held at Peoria, in Peoria county, on the second Monday of May next.

"Now, if the said Richard P. Morgan shall be and appear at the said court, to be held at Peoria aforesaid, on the second Monday of May next; and in case the said * * * shall not be received as bail in the said action, shall put in good and sufficient bail, which

shall be received by the plaintiff, or shall be adjudged sufficient by the court; or the said * * * being accepted as bail, shall pay and satisfy the costs and condemnation money which may be rendered against the said Richard P. Morgan in the plea aforesaid, or surrender the body of the said Richard P. Morgan in execution in case the said Richard P. Morgan shall not pay and satisfy the said costs and condemnation money or surrender himself in execution where by law such surrender is required, then this obligation to be void, otherwise to remain in full force and effect.

"Richard P. Morgan,
"S. S. Morgan,
"P. W. Peckham.

"Filed Nov. 8, 1858. Enoch P. Sloan, Clerk."

The declaration in the cause was upon this bond.

The defendants craved oyer of the bond, and demurred to the declaration. The court sustained the demurrer, and the plaintiff abiding by his declaration, the court rendered judgment for the defendants.

Walker, J.: It will not be controverted, that at common law, an obligation, signed and sealed by other persons than those named in the body or condition of the instrument, will bind all to its terms and conditions. If this was such a bond, there would be no question of its validity, and that all who had executed it will be bound for its performance. It is, however, insisted, that as this is a statutory bond, that the omission to insert the names of Sidney S. Morgan and Peter W. Peckham, either in its body, or in the condition, as to them, it is unauthorized and void. If this constitutes a material omission of the requirements of the statute, then such must be the effect, but if, on the contrary, the provision is only directory, its omission will not affect its validity. By a reference to English cases, it will be found that a bail bond which conforms substantially to their statute, is held to be sufficient, although there may be technical defects. 2 Levinz 123; 6 Mod. 122; 6 T. R. 702; 2 Strange 104; 9 East 55.

In the case of Reynolds v. Gore, 4 Leigh 276, it was held that where by mistake the name of the security is omitted in the body of the bond, but a blank was left where it should have been inserted, that the bail was nevertheless liable. This case is almost in point, and establishes, like the English decisions, the doctrine that a substantial compliance with the statute will suffice. The case of Adams v. Hedgepeth, 5 Jones' N. Car. Law Rep. 327, announces a different rule, yet the court in their opinion say, that they had previously held that such an omission in an administrator's bond, was immaterial. The court assigns no reason for the distinction in the two cases, nor is any perceived. They are both statutory obligations, and depend upon the statute for their validity.

In this case the securities must have known that they were executing a bail bond, not as principals, but as securities, as they were not sued or arrested, and the instrument recited that the principals had been. They also knew that the object of the bond was to procure the release of the principal from custody. This they no doubt intended to do, and when they read the bond and condition, and executed it, they must have intended to become liable if the condition of the bond was not performed. By executing the bond they obtained the release of the principal, and the plaintiff in the original action no doubt relied upon it as good and sufficient. In the administration of justice, mere technicalities, unless positively required by the law, should not be regarded, especially when they stifle justice, defeat the intention of the parties, and tend to no beneficial end. We regard this bail bond a substantial compliance with our statute, supported by authority, and it must therefore be held valid and binding.

The judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

Accord: Howell v. Parsons, 89 N. Car. 230; Potter v. State, 23 Ind. 550; Pequawkett Bridge v. Mathes, 7 N. H. 230, 26 Am. Dec. 737; Danker v. Atwood, 119 Mass. 146; McLain v. Simington, 37 Ohio St. 484.

INHABITANTS OF SOUTH BERWICK *v.* WILLIAM HUNTRESS ET AL.

53 *Maine* 89, 87 *Am. Dec.* 535 (1864).

Debt on a collector's bond. Plea non est factum.

The main facts sufficiently appear in the opinion.

The verdict was for the defendants and the plaintiffs excepted.

Kent, J.: The exceptions present a single question for our determination. The counsel for the plaintiffs requested this instruction, which the facts of the case made pertinent and applicable, "that a party executing a bond, knowing that there are blanks in it to be filled up, necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled after he has executed the bond." The presiding judge, in his instructions, assented to this as correct, when limited "to such matters appearing on the face of the instrument to be certain, such as the names of the sureties, who had signed, but that this rule would not apply to the penal sum in the bond; that being uncertain in its amount." He further instructed the jury, in substance, that they must be satisfied, from all the evidence, that Huntress was authorized by the defendants to insert the penal sum; and, if not so proved, that the insertion would be

a material alteration, and render the bond "invalid." The jury must have understood that something more than the facts assumed in the request must be established by proof.

It seems to be now well settled that where a party executes a deed, or bond, or other instrument, and delivers the same to another, in an imperfect state, and gives authority to that person to fill up the blanks, and thus perfect the instrument—and he does so—its validity can not be controverted. This authority may be by parol. It may be implied from the facts proved, when those facts, fairly considered, justify the inference. When the authority is established, either by evidence of express authority, or by implication, the power will extend as far as such express or implied authority is given. The law on this subject has recently been stated by the Supreme Court of the United States, in Drury v. Foster, 2 Wall. (U. S.) 24.

There is a class of cases where it is held that it is not a material alteration to insert a word or words that the law would itself supply, as the word "hundred" before "pounds," where the condition of the bond first stated that the full sum of one hundred pounds shall be paid by instalments specified, and then added the words "until the sum of one ——— pounds shall be paid." The court held that it was plain, what the meaning of the parties was, and what the party signing intended to be bound for. Waugh v. Bussel, 5 Taunton 707.

In the case of Hunt v. Adams, 6 Mass. 519, the same rule was applied to the case where the word "year" had been inserted before the words "of our Lord." In this case, C. J. Parsons discusses somewhat the general doctrine, and says that the consent of the obligor may as well be implied from the nature of the alteration, as when expressed. He cites several cases, where, without any evidence of assent beyond the instrument itself, alterations had been made by filling blanks. To the same point is the case of Brown v. Pinkham, 18 Pick. 172.

In the case at bar the requested instruction assumed that there was no direct evidence of authority to fill the blanks beyond the fact that the party executed the bond, knowing that there were blanks to be filled up. The question, then, is one as to the implied authority of the person, for whose use the bond was made, to fill any or all the blanks, before delivering the bond to the town.

It may be likened to a case of an accommodation note, indorsed when imperfect, and left with the maker, for whose use it was made, to be negotiated by him. In numerous cases of this kind it has been held that an indorsement on a paper without sum, or date, or time of payment will hold the indorser for any sum, payable at any time which the person to whom the indorser entrusts it chooses to insert. Violett v. Patten, 5 Cranch 142; Russel v. Longstaff, Dougl. 514. Or, where the name of the payee is left blank. Crachly v. Clarence, 2 M. & S. 90. Or, where indorsements on blank pieces of paper were left with a clerk, the party indorsing expecting and in-

tending that promissory notes would be written on them. Putnam v. Sullivan, 4 Mass. 45.

Where the indorsers commit a promissory note to the maker, with a blank for the date, they authorize him to fill it up with what date he pleases, even a date prior to the day of the actual making of the note, which was payable in sixty days from date. Mitchel v. Culver, 7 Cowen 336. So, if the sum be left in blank, it may be filled up. M. & F. Bank v. Schuyler, 7 Cowen 337, in note.

Where it appears that the parties intended that the note should be for $800, and it read, pay "eight," with a blank space, the maker, without the assent of the indorser, may insert the words "hundred dollars," and the indorser will be holden. Boyd v. Brotherson, 10 Wendell 93. Consol

Where a party intended to give a note for the amount of a debt, which amount he minuted in figures on the margin, but wrote the note for $300 instead of $334 (the sum on margin), it was held that the creditor may, without express authority, insert the words and sum omitted. Clute v. Small, 17 Wendell 238.

In each of these cases the decision seems to rest upon the fact that the filling up, or insertions, were in accordance with the intention of the parties, and to carry out and fix the liabilities actually agreed upon or assented to.

There are numerous cases, analogous in principle to the one before us. They are cases where the court has, in effect, made the insertions itself to carry out the obvious intentions of the parties. In all such cases it is fair to infer that if they had been made by a party they would have been sanctioned by the court. The court, in this matter, would seem to have no greater legal right than an individual.

Thus, in the case of Coles v. Hulme, 8 B. & C. 568 (15 E. C. L. 299), where the penal sum was stated as 7,700, it was held that the word "pounds" must be inserted by the court.

Green v. Walker, 37 Maine 27, where a replevin bond bound the plaintiff to pay to himself costs, damages, etc., is was held that it should be read as if defendant's name was inserted in place of plaintiff's. In this case will be found citations of numerous authorities on this subject. Coolbroth v. Purrington, 29 Maine 469.

It may, perhaps, be doubtful, whether some of these cases do not go beyond the true limit; particularly the one cited from 17 Wendell, where the party was allowed to insert an additional sum into the body of a note which was a perfect instrument before. The amendment and interlineation would seem to make a new contract and to vary and alter essentially the one written and signed, without the assent of the maker, on the single ground that, by evidence aliunde, it appeared probable, or reasonably certain, that the party intended to give a note for the larger sum inserted afterward.

There seems to be a manifest distinction between the addition of

new words, or the erasure of words and the substitution of others, changing the liability, in an instrument perfect when signed, and the insertion of words to fill up blanks, which the party signing knew must be filled up to make the bond or contract perfect in form or substance. In the one case it is, in effect, making a new contract; in the other it is but finishing and making perfect the contract agreed upon.

The law on this subject in Massachusetts, before the separation, is stated by C. J. Parsons, in Smith v. Crooker, 5 Mass. 538. That was a case on a collector's bond, in which, after the surety had signed, a blank had been filled. The judge, after stating the general principle, that it would not be an alteration which would avoid the bond, to fill up blank spaces left, if the party executing the bond agrees that it may be afterward filled up, says: "And the party executing the bond, knowing that there are blanks in it to be filled up by inserting particular names or things, must be considered as agreeing that the blanks may be thus filled, after he has executed the bond." This decision is cited and accepted by the counsel on both sides as the rule to be applied to the case at bar.

It was adopted by the presiding judge, but he ruled that the filling of the blank space, left for the insertion of the penal sum, did not come within the rule. The correctness of that ruling is the question now presented by the exceptions.

It is evident that the implied authority is limited, but it clearly may extend beyond mere matters of form, or the mere insertions of words, which the law itself would supply. It may, as it has been shown, extend to those matters which are required to make it a binding and perfect instrument.

We think that when a party signs a bond and delivers it to another, not stipulating or expecting that the paper will be returned or afterward exhibited to him, but be delivered to the obligee when perfected, and, when he so delivers it there are blanks in it to be filled up, before it can be perfected, and he knows the fact, those blanks may be filled up, without any further knowledge or assent on his part, provided that the insertions thus made do not change the relations of the parties, or alter, or vary the actual agreement made, or create any new liability, or enlarge any responsibility embraced in the contract between the parties, but only make perfect in writing what was actually agreed upon. It can not be controverted when thus completed. In the case at bar the whole contract or agreement is manifest from the condition, which was a part of the bond when signed. How far the rule may apply to cases where the whole proof of the agreement is found in extraneous evidence, we are not now called upon to decide. It is clear that, at all events, the evidence must be of a plenary and conclusive character, and leave no doubt of the exact character and terms of the bargain or understanding between the parties.

We are aware that a distinction has been taken between parol contracts and those under seal, and that, in some cases, it has been held that the rule can not be applied to bonds or deeds. A recent case in Massachusetts, Burns v. Lynde, 6 Allen 305, seems to favor this view. That, however, was a case where, when the seal and signature were affixed to the paper, it was a printed form of a deed, in which none of the blanks had been filled up. As the court say: "When the paper was delivered, it had no validity or meaning. The filling of the blanks created the substantial parts of the instrument itself, as much so as the signing or sealing." The defendant filled the blanks, after it was given to him by the signer, in her absence, by entering the names of the parties, the description of the land, and the agreement of release of dower on her part, and the date, and other words necessary to complete it. The defendant offered to prove that, when she signed it, she authorized him to fill it up as he did, and that, after it was filled up and the husband had executed it the defendant informed her of the facts, and she thereupon verbally assented to what had been done, and agreed that it should be taken to be her deed, duly executed. This evidence was excluded; and the court held that the prior authority did not give a right to make this entire deed, and that the subsequent assent did not amount to a new delivery.

That case differs from the one before us in several particulars, especially in the point that the paper or deed, when signed, contained nothing expressive of the intentions of the parties, or a description of the property to be conveyed. Nothing could be gathered from it.

The examination of various cases in this country and in England shows that, whilst in some of them the strict rule has been recognized, yet there are none that deny the proposition that in some cases blanks may be filled in sealed instruments by a third person, who is not authorized by power under seal. The only distinction taken between parol contracts and those under seal is a purely technical one, viz., that an authority to make a deed or execute a sealed instrument for another must be of as high a character as the instrument, i. e., be under seal. It is an unquestioned doctrine of the common law that a person, not authorized by power under seal, can not execute a sealed instrument for another, or change a parol contract into a specialty. Now, if it is the absence of the seal on the authority that prevents the validity of the execution, it would seem that nothing could supply it, not even consent by parol. And yet, as before stated, all the cases seem to recognize the validity of such filling up, if done in the presence of the grantor, and consent inferred from the act being done in the presence of the grantor, and consent given before or after, or implied consent. Warring v. Williams, 8 Pick. 322; Warring v. Williams, 8 Pick. 325; Hudson v. Revett, 5 Bingham 368 (15 E. C. L. 467).

In these cases it is assumed that the act is done by the assent and authority of the grantor, because he is present when it is done by another. And yet, if the authority must be under seal, where is the evidence of it? The whole evidence is parol; the fact of the presence and the assent is proved by parol. The act derives its efficacy only from authority dependent on other sources than a seal. It is consent that gives it vitality, and that consent, it is proved by parol, was given by parol. Why may not consent be established by proof that the authority was directly given before the act was done, and when the paper was not before him? There is no clearer parol authority in one case than in the other. It is, after all, a mere question of assent. Now, consent may be implied as well as expressed, and, when fairly and legally inferred, it is actual and effective consent, as much so as when direct authority is shown by parol. It would seem to follow that the rule requiring authority under seal should either be strictly enforced in all cases of bonds or deeds, so that no interlineations or insertions can be legally made without such power, or the rule should be, that such filling up may be made when authority or consent is clearly established by parol. And this on the ground that, if necessary, the act may be considered as having been done, in substance, by the grantor himself. When the instrument is a sealed instrument, when signed by the party, the filling in of the blanks afterward by another is not, strictly speaking, the execution of a sealed instrument. That has already been done by the party himself. The third party does not make it a specialty by his act. It was one before. The filling up merely perfects an imperfect sealed deed or bond. This is the view taken by the English court, in Hudson v. Revett, 5 Bingham, before cited. The court say (by Gusselee, J.): "The way in which I consider that this deed is good is this—that it was an imperfect execution, with an agreement at the time that it should take effect when the blanks were filled up." On this point, see Knapp v. Maltby, 13 Wendell 587.

In one of the most recent cases in England, that of Eagleton v. Gutteridge, 11 M. & W. 466, it was held that the filling in of a blank in a power of attorney under seal, which was sent from a foreign country, did not invalidate it, on the ground that consent might be inferred.

The court in Massachusetts, in the learned opinion before cited of Burns v. Lynde, admit that the American decisions are generally against the strict views taken by them. This is undoubtedly so. In Pennsylvania, in the case of Wiley v. Moor, 17 S. & R. 438. In numerous cases in New York, Bank v. Kostright, 22 Wend. 364; Wooley v. Constant, 4 Johns. 54; Ex parte Decker, 6 Cowen 60; Ex parte Kerwin, 8 Cowen 118; Humphreys v. Guellow, 13 N. H. 385. These cases, and numerous others in different states, recognize consent as the essential fact, and do not give any greater effect to consent when express or implied from the presence and presumed

knowledge of the signer than when fairly implied from his acts or declarations. Nor do they distinguish between prior and subsequent assent.

The Supreme Court of the United States had, in several cases, indicated the same general views. (Speake v. United States, 9 Cranch 28; White v. Vermont R. R., 21 How. 575.) And the same court, in the recent case of Drury v. Foster, 2 Wall. 24, has distinctly and unqualifiedly settled the question. The court say: "We agree that, by signing and acknowledging the deed in blank, and delivering the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance, its validity could not well be controverted. Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion, at this day, is that the power is sufficient."

The rule invoked is purely technical. Practically, there is no real distinction in this matter between bonds and simple contracts. There is no more danger of fraud or injury or wrong in allowing insertions in a bond than there is in allowing them in a promissory note or bill of exchange. Both are agreements or contracts, and in neither can unauthorized alterations be made with impunity. Considering that the assumed difference rests on a mere technical rule of the common law, we do not think that the rule should be extended beyond its necessary limits, viz., that a sealed instrument can not be executed, by another, so far as its distinguishing characteristic as a sealed instrument is in question, unless by an authority under seal.

It remains to apply the principles before stated to the case before us. The ruling of the judge was in favor of the plaintiffs so far as the insertion of the names of the sureties who had signed, and all other matters appearing on the face of the instrument to be certain. The only question is as to the insertion of the penalty. The case, as stated in the report, sets out various questions of fact which were in dispute, and recites that there was evidence tending to show that the bond was in a certain condition, when signed, as to blanks and seals. We, however, can only look to the rulings and request, when the facts are not stated as agreed upon or settled. The request assumes that the party had signed and executed the bond before parting with it. This could only be done by sealing it himself. The ruling, on the point of the insertion of the penal sum, assumes that, if Huntress was authorized by the defendants to insert the penal sum, he might do so. But that this authority must be distinctly proved, and required other evidence to sustain it, than was required to authorize the insertion of other matters, appearing on the face of the paper to be certain. The reason given is that the penal sum of the bond is uncertain.

At first view, the penalty seems to be a vital and controlling part of the bond. But, in truth, in a bond with a condition, subject to

chancery, the condition is the essential portion. The penal sum is almost a matter of form. In this case the parties intended to execute a bond to secure the town from loss by the defaults of the collector. This was the whole substance of the agreement. This was what the parties understood and assented to. This is the whole of the condition, as expressed in the bond. Now, no penal sum, however large, could extend this liability. If large enough to cover the possible deficiencies, any increase of that amount would be simply nugatory, and of no avail to charge the signers. If a less sum is inserted, it may save the signers from a portion of their assumed liability, and therefore could not be objected to by them on the ground that it enlarged the responsibility assumed by them in the condition. So that, "quacunque via data," the insertion of any sum as the penalty can not charge the obligors beyond the actual liability secured in the condition which was in the bond when signed. The insertion of a penal sum, therefore, operated simply to perfect the bond according to the original understanding, without injuriously affecting the signers. In a bond like this, it is one of those things, Parsons, C. J., says may be inserted without thereby avoiding the bond. The principle was correctly stated by the judge, but we think he erred in distinguishing between the penal sum and the other insertions. The case must go back for a new trial on the principles stated in this opinion.

Exceptions sustained.

New trial granted.

Appleton, C. J., Davis, Walton, Barrows and Danforth, JJ., concurred.

Accord: Rose v. Douglass Township, 52 Kans. 451, 34 Pac. 1046, 39 Am. St. 354; White v. Duggan, 140 Mass. 18, 2 N. E. 110, 54 Am. Rep. 437; McCormick v. Bay City, 23 Mich. 457; Butler v. United States, 21 Wall. (U. S.) 272, 22 L. ed. 614; Fullerton v. Sturges, 4 Ohio 529; Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39; Treasurer of State Asylum v. Douglass, 77 Mo. 649; State v. Young, 23 Minn. 551.

Contra: State v. Boring, 15 Ohio 507; Copeland & Brantley v. Cunningham, 63 Ala. 394; Spring Garden Ins. Co. v. Lemmon, 117 Iowa 691, 86 N. W. 35; Church v. Noble, 24 Ill. 291.

See also Evarts v. Steger, 6 Ore. 55.

TRUSTEES OF SCHOOLS *v.* JACOB SHEICK ET AL.

119 *Ill.* 579, 8 *N. E.* 189 (1886).

Mr. Justice Graig delivered the opinion of the court:

This was an action of debt, brought by the board of school trustees against appellees upon the bond of Philip Reitz, a defaulting school treasurer. In the circuit court the plaintiffs recovered a

judgment, and decided that no action could be maintained on the bond against the sureties, and under this ruling no remanding order was entered. The bond was never executed by Philip Reitz, the principal, although his name was inserted in the condition and obligatory part of the instrument. It was properly executed by appellees, as sureties, and was accepted and approved by the board of school trustees.

Much reliance seems to be placed, in the argument, upon the finding of facts as incorporated in the judgment of the appellate court, it being claimed that the court found that appellees signed the bond upon the condition that it should not be delivered until it had been executed by the principal. We do not so understand the finding. The circuit court had found the facts, and recited in the record what that finding was, and this seems to have been adopted and sanctioned by the appellate court. Upon an examination of the finding of the circuit court it will be seen that the court found, from the evidence, that Reitz promised the sureties that he would sign the bond before it was delivered. This, however, does not constitute the execution of a bond upon condition that it should not be delivered unless executed by the principal. Indeed, the sureties seemed to rely upon the promise of Reitz, and not upon a conditional delivery, as is apparent from the finding of facts by the circuit court, and from the decided weight of evidence.

It is also said that the liability of appellees should be construed strictly. The general rule is, that the undertaking of a surety is to be construed strictly. He is only bound in the manner and to the extent set forth in the obligation executed by him. (Cooper v. The People, 85 Ill. 417.) But, adhering to this rule to its ultimate limit, are the sureties liable on the obligation which they executed? The statute required this bond to be executed and delivered to the trustees for the purpose of keeping secure the public funds and for the purpose of guarding against a public loss. In view of this fact, while we regard it proper to adhere to the rule of law indicated above, still a surety who has incurred an obligation of this character should not be allowed to escape liability upon a mere technical defect in the obligation he may have executed, which does not go to the substance of his undertaking. Keeping this principle in view, we will examine the principal objections urged against the validity of the bond upon which the action is predicated.

It is claimed that where the name of an intended co-obligor appears upon the face of a bond, who has not executed it, the instrument is imperfect, and not binding. The decisions of the courts of the different states are not harmonious in regard to the binding effect of a bond upon the rights of sureties, where the bond has not been executed by the principal. In Bean v. Parker, 17 Mass. 603, where an action was brought against the sureties on a bail bond which had not been executed by the principal, the court held that

no action could be maintained. It is there said: "We think it essential to a bail bond that the party arrested should be a principal. It is recited that he is, and the instrument is incomplete and void without his signature." In a late case (Russell v. Annable, 109 Mass. 72), where the principals in a bond constituted a firm, and the firm name was signed by one of the partners, the court held that the surety was not bound unless it appeared that the partner who signed the firm name had authority from his partner to do so. In Wood v. Washburn, 2 Pick. 24, an administrator's bond, not executed by the administrator, was held not to be binding on the surety. In Ferry v. Burchard, 21 Conn. 602, a similar question arose, and the court held that a contract of a surety was of such a nature that there could be no obligation on his part unless the principal was also bound. In Brown v. Jetmore, 70 Mo. 228 (a late case, and one, too, quite similar to the one before us), the sureties on a constable's bond were held not liable for a default of the constable, upon the sole ground that the bond had not been executed by the principal. There are other cases holding a like view, and there are others which hold that the sureties may be held liable although the principal did not execute the instrument. State of Ohio v. Bowman, 10 Ohio 445, was an action on a treasurer's bond. The principal's name was in the body of the bond, but he did not sign the instrument. The sureties defended on the ground that the principal had not signed it, but the court held that they were bound. Loen, Admr., v. Stocker, 68 Pa. 226, was an action against sureties on a bond of indemnity. The principal's name had been signed without authority. In the decision of the case it was said: "Had the bond not been executed at all by the principal, though his name was mentioned as one of the obligors in the body of the instrument, it is clear that the surety could not avail himself of this fact as a defense." Herrick v. Johnson, 11 Metc. 34; Keyser v. Keen, 17 Pa. 330; Haskins v. Lambert, 16 Maine 142; Grim v. School Comrs., 51 Pa. 219; Williams v. Marshall, 42 Par. 524; and Miller v. Ferris, 10 Upper Can. 423, announce a similar rule.

Johnston v. Township of Kimball, 39 Mich. 187, is a case in its facts quite similar to the one under consideration. There, as here, the suit was against the sureties on the official bond of a defaulting treasurer. The bond was drawn, setting out the names of the principal and sureties, but it was never executed by the principal. In the decision of the case the court said: "Our statute plainly contemplates that the treasurer shall himself be a party to his own official bond. And while we are not prepared to hold that a bond knowingly and intentionally given without his concurrent liability will not bind the obligors, we are of the opinion that where he purports to be obligor, and does not sign the bond, there must be positive evidence that the sureties intended to be bound without requir-

ing his signature, before they can be held responsible." See also, Hall v. Parker, 39 Mich. 287, where the same doctrine is announced.

We have given the authorities bearing on the question due consideration, and we are not inclined to adopt the view held by the courts, that a bond signed by the sureties without the signature of the principal may not be binding upon those who execute it, as was held in the case cited from Missouri, and other like cases. If the sureties saw proper to bind themselves without the principal executing the bond and becoming bound, we think they might do so, and their undertaking is one that may be enforced in the courts by an appropriate action. The fact that the principal obligor in this case failed to sign the bond, was a mere technicality, which ought not to affect the rights of any of the parties concerned. In what way are the sureties injured by the omission of the principal obligor to sign the bond? If they are compelled to pay the trustees any sum of money on account of the default of the treasurer, they can recover the amount back from him whether he signed the bond or not. So far, then, as they are concerned, they are in as good a position as if Reitz, the treasurer, had properly executed the bond. If Reitz is insolvent, a judgment in favor of the trustees, against him, could be of no benefit to the sureties. If, on the other hand, he is solvent, the sureties can collect from him whatever sum they may be required to pay in consequence of executing the bond. If the bond had been signed by the sureties upon condition that it should not be delivered to the trustees until executed by the treasurer, and if the trustees had received notice of such condition, or notice of such facts pointing to such a condition as might put a prudent person on inquiry, before the bond was approved, then they could not be regarded as innocent holders of the instrument, and entitled to maintain an action upon it. But the sureties, as appears, did not sign the bond on such condition, but executed the instrument, and relied merely upon the promise of the treasurer that he would, before delivery of the bond, sign it. This was no more than a secret promise made by Reitz, the treasurer, to those who signed as sureties, which could not be binding upon the trustees. They had no notice of the arrangement existing between the treasurer and the sureties, and they ought not to be affected by it.

In Smith v. Peoria County, 59 Ill. 414, where an action was brought upon an official bond against one of the sureties, he set up as a defense that he signed the bond on condition that it should also be executed by one Cox, as cosurety, before it should be delivered; that Cox failed to execute the bond; that, in violation of the agreement, the bond was delivered, without his knowledge or consent. On demurrer to pleas in which this defense was set up, the matters alleged were held not to constitute a valid defense to the action

on the bond, but other pleas in which the same facts were set up, and also that the plaintiff had notice, were held to constitute a valid defense to the action. Under the ruling in the case cited, if the bond in this case was signed by appellees upon condition that it was not to be delivered until executed by the principal, and the trustees, at the time they accepted and approved the bond, had notice, no action could be maintained on the bond; but, as said before, no such defense was made out.

The judgment of the appellate court will be reversed, and the cause remanded to that court for further proceedings in conformity to this opinion.

Judgment reversed.

Mr. Justice Schofield, dissenting.

Accord: Cockrill v. Davie, 14 Mont. 131, 35 Pac. 958; McKissack v. McClendon, 133 Ala. 558, 32 So. 486; Douglas County v. Bardon, 79 Wis. 641, 48 N. W. 969; Star Grocery Co. v. Bradford, 70 W. Va. 497, 74 S. E. 509; State v. Bowman, 10 Ohio 445; Empire State Surety Co. v. Carroll County, 194 Fed. 593.

GAY, ADMINISTRATOR, APPELLANT, *v.* MURPHY ET AL.

134 *Mo.* 98, 34 *S. W.* 1091, 56 *Am. St.* 496 (1896).

BURGESS, J.: Action to recover of defendants, as sureties of Andrew G. Wallin, damages aggregating the sum of $6,373.14 for breaches of a building bond. The penalty of the bond is $10,000. It was never signed by the principal, Wallin. It reads as follows:

"Know all men by these presents, That Andrew G. Wallin, of the city of St. Louis, Mo., as principal, and P. C. Murphy, L. A. Bowlin and Charles Green, as securities, are jointly and severally held and firmly bound unto Taaffe & Gay, of the city of St. Louis, Mo., in the sum of ten thousand dollars ($10,000), lawful money of the United States of America, well and truly to be paid to the said Taaffe & Gay, for which payment well and truly to be made, we bind ourselves, and each of us by himself, our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals and signed with our hands, this thirtieth day of April, in the year of our Lord eighteen hundred and ninety.

"The condition of the above obligation is such that, whereas, the said Andrew G. Wallin, principal, has on the day of the date of these presents, executed and entered into a certain contract for the erection of certain buildings in said contract described, which contract is hereto annexed: Now, if the said Andrew G. Wallin shall well and truly perform and fulfil all and every the covenants, conditions, stipulations and agreements in said contract mentioned to be performed and fulfilled, and shall keep the said Taaffe & Gay,

owners, harmless and indemnified from and against all and every claim, demand, judgments, liens, and mechanic's liens, costs and fees of every description, incurred in suits or otherwise, that may be had against them or against the buildings to be erected under said contract and shall repay the said Taaffe & Gay all sums of money which they may pay to other persons on account of work and labor done or materials furnished on or for said buildings, and if the said Andrew G. Wallin shall pay to the said Taaffe & Gay all damages they may sustain, and all forfeitures to which they may be entitled by reason of the nonperformance or malperformance on the part of said Andrew G. Wallin of any of the covenants, conditions, stipulations and agreements of said contract, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

"Witness our hands and seals.

"P. C. Murphy, (Seal.)
"L. A. Bowlin, (Seal.)
"Charles Green, (Seal.)
"——— ———. (Seal.)"

Defendants admitted that all the signatures to said bond and contract are the genuine signatures of the parties thereto, but objected to the admission of the bond in evidence, on the ground that said bond is not regular or complete on its face, inasmuch as it described Andrew G. Wallin as principal, and is not signed by him, and it does not appear that the defendants, who signed as securities for Wallin, consented to be bound without the signature of said principal.

It is contended by plaintiff that the bond is prima facie valid and binding on those who signed it, though not signed by the principal, and as it is found in the possession of the obligees, if for any reason defendants are not bound, the burden of showing that they are not rests upon them.

Upon these questions the authorities are in much conflict, and irreconcilable. The following authorities hold that an official bond, or a bond required by statute, not signed by the principal, when purporting to be executed by him, is prima facie invalid as to the sureties. Bunn v. Jetmore, 70 Mo. 228; Sacramento v. Dunlap, 14 Cal. 421; Johnston v. Kimball Township, 39 Mich. 187; Wood v. Washburn, 2 Pick. 24; Russell v. Annable, 109 Mass. 72; Goodyear, &c., Co. v. Bacon, 151 Mass. 460; Green v. Kindy, 43 Mich. 279; Ferry v. Burchard, 21 Conn. 597; Curtis v. Moss, 2 Rob. (La.) 367; State ex rel. v. Austin, 35 Minn. 51; Board v. Sweency, 48 N. W. 302; Bean v. Parker, 17 Mass. 591; Martin v. Hornsby, 56 N. W. 751.

Under such circumstances the presumption is that each one of the sureties signed the bond upon the understanding that the others

named as obligors and especially the principal would also sign it. Johnston v. Kimball Township, supra; Wells v. Dill, 1 Mart. (La.) N. S. 592.

In Sacramento v. Dunlap, supra, the court, speaking through Justice Field, said: "The liability of the sureties is conditional to that of the principal. They are bound if he is bound, and not otherwise. The very nature of the contract implies this. The fact that their signatures were placed to the instrument can make no difference in its effect. It purports on its face to be the bond of the three. Some one must have written his signature first, but it is to be presumed, upon the understanding, that the others named as obligors would add theirs. Not having done so, it was incomplete and without binding obligation upon either."

It is also said in that case that "the instrument in this case is, in form, a joint bond only, and not joint and several, and, in this respect, differs materially from the bonds in the cases of Parker v. Bradley et al., 2 Hill 584; Cutter v. Whittemore, 10 Mass. 442, and The State of Ohio v. Bowman et al., 10 Ohio 445."

But The People v. Hartley, 21 Cal. 585, which was also a suit on a joint bond, the court cites with approval Bean v. Parker, supra, and Wood v. Washburn, supra.

The bond under consideration is like the bonds in Bunn v. Jetmore, supra, and Russell v. Annable, supra, joint and several; but as was said in Board v. Sweeney, supra, "the decisions are placed upon the broad doctrine that the instrument, as delivered, is an incomplete and imperfect instrument, and is not the contract contemplated by the parties, or that the sureties understood they were making when they affixed their signatures to the instrument."

It was said in Russell v. Annable, 109 Mass. 72, "the instrument is incomplete without the signature of each partner, or proof that the signature affixed (firm name) had the assent and sanction of each of them. The sureties on a bond are not holden, if the instrument is not executed by the person whose name is stated as the principal therein. It should be executed by all the intended parties."

It is held in Ward v. Churin, 18 Gratt. 801; Williams v. Springs, 7 Ired. L. 384; Blume v. Bowman, 2 Ired. L. 338; Chandler v. Temple, 4 Cush. 285; Grim v. School Directors, 51 Pa. St. 220, that the possession of such a bond by the obligee is prima facie evidence of its delivery by the persons who have signed it, and the burden is on them to show that it was not to be delivered until signed by the principal.

As holding that such a bond when joint and several is binding on all who sign it, may be cited, Loew's Admr. v. Stocker, 68 Pa. St. 226; Woodman v. Calkins, 34 Pac. 187; Miller v. Tunis, 10 Up. Can. (C. P.) 423; State to use v. Bowman, 10 Ohio 445; Johnson v. Johnson, 31 Ohio St. 131; Douglas Co. v. Bardon, 79 Wis. 641; Trustees v. Sheik, 119 Ill. 579; State v. Peck, 53 Maine 284;

Wild Cat Branch v. Ball, 45 Ind. 213; Cooper v. Evans, 36 L. J. Chan. 431.

With respect to official and other statutory bonds, which are in the one instance required by statute to be executed by the officer, and in the other to be given by the principal in the bond, the weight of authority is in accord with the ruling of this court in the Jetmore case, 70 Mo. 228; that is, if the name of the principal is called for in the bond, and it is not signed by him, it is not only void as to him, but as to all who sign it as sureties. And it makes no difference whether it be in form joint or several, and, if the obligee would hold them liable on it he must show that they consented to be bound without the signature of the principal. When there is no principal in such case there is no surety.

The rule is different when the bond is signed by the principal, and is not signed by one of the sureties named in the bond. In such circumstances the bond is prima facie binding on all who sign it. And if those who sign it would avoid responsibility thereon the burden rests upon them of showing that at the time of its execution it was agreed that the bond should not be delivered as their deed until all persons named in the bond as sureties had executed it. State ex rel. v. Sandusky, 46 Mo. 377; Grim v. School Directors, 51 Pa. St. 220; Blume v. Bowman, 2 Ired. L. (N. C.) 338; Ward v. Churn, supra; Towns to use v. Kellett, 11 Ga. 286; Chandler v. Temple, 4 Cush. supra; Bank v. Ridgely, 1 Harr. & Gill. 324; Pawling v. United States, 4 Cranch 219; Fletcher v. Austin, 11 Vt. 447; Whitaker v. Richards, 134 Pa. St. 191.

In State to use v. Potter, 63 Mo. 212, after an able and elaborate review of all the authorities, Sherwood, J., writing the opinion of the court, held that an agreement of a surety with his principal, that the latter shall not deliver a bond till the signature of another is procured as a cosurety, will not relieve the surety of his liability on the bond, although the cosurety is not obtained, where there is nothing on the face of the bond, or in attending circumstances, to apprise the taker that such further signature was called for in order to complete the instrument. See also Dair v. United States, 16 Wall. 1; State ex rel. v. Baker, 64 Mo. 167; State ex rel. v. Modrel, 69 Mo. 152; State ex rel. v. Hewitt, 72 Mo. 603; Wolff v. Schaeffer, 74 Mo. 154.

If, then, the bond sued on, being as we hold a common-law bond (State ex rel. v. Thompson, 49 Mo. 188), is to be governed by the same rules of law that official and statutory bonds are, it is prima facie invalid, and the referee did not err in sustaining the objection to its admission in evidence.

And it makes no possible difference, we think, that it is a joint and several bond, as under the Missouri statute (§ 2384, Rev. Stat., 1889) all contracts which by the common law are joint only, are to be construed to be joint and several; and while such a distinc-

tion has been made by courts of high authority (Sacramento v. Dunlap, 14 Cal. supra; Parker v. Bradley, 2 Hill (N. Y.) 584 supra; Cutter v. Whittemore, 10 Mass, 442; State to use v. Bowman, 10 Ohio supra; Kurtz v. Forquer, 94 Cal. 91), it has never been made by this court.

The authorities cited on the question of the invalidity of an official or statutory bond, not signed by the principal named in such a bond, make no distinction between the class of bonds and a common law bond; but there are authorities which make such a distinction (State to use v. Bowman, supra), a principle which we do not controvert, when the bond shows that it is the intention of the sureties to bind themselves regardless of the fact whether the principal signs it or not.

Nothing of the kind appears from the bond in this case. On the contrary, it plainly shows that it was to be signed by the principal in order to make it a complete instrument. By the insertion of his name in the bond as principal there was an implied promise to the sureties that this would be done before it was delivered, and the obligees could not shut their eyes to its imperfect execution thus patent, and hold the sureties liable on the bond without showing by evidence that they intended to be bound in the condition that it was in when they signed it in any event, whether signed by the principal or not.

As it logically follows from the conclusion reached that the judgment must be affirmed, it becomes unnecessary to pass upon other questions raised by defendants. The judgment is affirmed. Gantt, P. J., and Sherwood, J., concur.

Accord: Weir v. Mead, 101 Cal. 125, 35 Pac. 567, 40 Am. St. 46; School District v. Lapping, 100 Minn. 139, 110 N. W. 849; Novak v. Pitlick, 120 Iowa 286, 94 N. W. 916, 98 Am. St. 360.

SECTION 5. CONTRACT OF SURETYSHIP OBTAINED BY DURESS

MARGARET ROBINSON *v.* DANIEL GOULD

65 *Mass.* 55 (1853).

Assumpsit upon a promissory note, dated August 24, 1851, payable to the plaintiff on demand. The main ground of defense was duress and a want of consideration. At the trial in the court of common pleas, before Wells, C. J., the defendant offered evidence tending to prove that the present plaintiff having a note against one Greenough, a writ against him was given to a constable, who went to Greenough's house to get security, or to arrest him, and that the

note in suit was given to release said Greenough from arrest until the following Tuesday. There was also some evidence tending to show that said note was given as collateral security that said Greenough should pay the plaintiff the amount of his claim on or before the following Tuesday, and that the proceedings for collecting the same should be suspended until that time, but that said Greenough had not paid said indebtedness. It was admitted that the constable had no legal right to serve said writ against Greenough, and the defendant requested the presiding judge to rule that if said constable, having no legal right to serve said writ, imprisoned said Greenough, and threatened to and was about to arrest him, and thereby the defendant was led to give this note, it would be void; and that if said constable did not disclose to the defendant what he knew touching said note first sued on, or misled the defendant, to think he was becoming bail merely, this note would be void. The judge declined so to instruct the jury, but instructed them that the note was prima facie evidence of a debt to the amount specified in the same, and that the burden of proof was on the defendant to impeach it: that it was for the jury to decide, in view of all the evidence, as to the agreement made by the parties, to carry out which the note in suit was given: that if the agreement was, that in consideration of giving the note, the constable should forbear to arrest the said Greenough, or should release him if arrested, or if the note was agreed to be taken as a substitute for a bail bond, in either of these cases as the constable was not authorized to serve the writ, the note would be void; but if the note was given as collateral security that the said Greenough should pay the first note by the next Tuesday, and that the plaintiff should give credit and forbear asking or attempting to force payment on the first-mentioned note until the said Tuesday, and the plaintiff did give said credit until said time, and the said Greenough omitted to make payment on that day, then the said note was valid to the extent of the amount of the first-mentioned note, and interest, and that it would not invalidate the note to prove that the same was given in consequence of a threat to arrest the said Greenough, if the first-mentioned note was not secured, or by actually arresting him on said writ, if the plaintiff's agent and the constable supposed the arrest was legal. The jury was requested to find specially whether any arrest was made, and they found there was not. The verdict was for the plaintiff for the amount of the first note and interest, and the defendant filed his exceptions.

Bigelow, J.: The general rule of law is well established, on reasons of justice and sound policy, that contracts, in order to be valid and binding, must be the result of the free assent of the parties. Therefore duress, either of actual imprisonment or per minas, constitutes a good defence to an action on a contract in behalf of

those from whom contracts have been thus extorted. Duress by menaces, which is deemed sufficient to avoid contracts, includes a threat of imprisonment, inducing a reasonable fear of loss of liberty. 2 Rol. Ab. 124; 2 Inst. 482-3; Bac. Ab. Duress (A); 20 Amer. Jur. 24; Chit on Cont. 168. It is well settled that the duress, which will avoid a contract, must be offered to a party who seeks to take advantage of it. This was early adjudged in Mantel v. Gibbs, 1 Brownlow 64, where, to an action of debt, brought on an obligation, the defendant pleaded that a stranger was imprisoned until the defendant, as surety for the stranger, made the bond. This was held a bad plea. The same principle is laid down in Hanscombe v. Standing, Cro. Jac. 187, where it was held that none shall avoid his own bond for the imprisonment or danger of any other than of himself only, and although the bond be avoidable as to the one, yet it is good as to the other. Wayne v. Sands, 1 Freeman 351; Shep. Touch. 62; McClintick v. Cummins, 3 McLean 158; 20 Amer. Jur. 26.

And certainly this distinction rests on sound principle. He only should be allowed to avoid his contract, upon whom the unlawful restraint or fear has operated. The contract of a surety, if his own free act, and executed without coercion or illegal menace, should be held binding. The duress of his principal can not affect his free agency or in any way control his action. It may excite his feelings, awaken his generosity, and induce him to act from motives of charity and benevolence toward his neighbor; but these can furnish no valid ground of defence against his contract, which he has entered into freely and without coercion.

The case at bar falls very clearly within this principle. The defendant was put under no restraint; no threats were made to him. His principal may have been coerced to apply to the defendant to be his surety, but there is nothing in the case which tends to show any duress toward the defendant.

Exceptions overruled.

Accord: Oak v. Dustin, 79 Maine 23, 7 Atl. 815.

GRIFFITH ET AL. *v.* SITGREAVES [1]

90 *Pa. St.* 161 (1879).

Assumpsit by Matthew H. Griffith, James Roberts and J. Milton Butler, partners, trading as Griffith, Roberts & Butler, against Theodore R. Sitgreaves, to recover $2,903.68, the amount of seven promissory notes, of which defendant was the accommodation endorser for Robert C. Pyle, the maker. The defendant pleaded non-assumpsit.

The court, inter alia, found the following facts:

That at the time said notes were signed and delivered by said Pyle to Matthew H. Griffith, one of the plaintiffs, the said Pyle was under duress of imprisonment and duress per minas, by reason of acts done and threats made by said Griffith, and the general conduct of said Griffith, and one Thomas Wheeler, commencing in the forenoon on the 9th of January and terminating in the afternoon of the 11th of January, 1874. That the said notes were signed and delivered as aforesaid, under and by reason of said duress. That there is no evidence in this case from which the court can find as a fact that Pyle after the making and delivery of said notes, agreed or promised to pay said notes, made any declarations or done any act by which he either waived the right or estopped himself or Sitgreaves to set up said duress as a defence in an action on said notes either against himself or Sitgreaves.

The court having found the fact that the notes were signed and delivered by Pyle to the plaintiffs under and by reason of duress of imprisonment and duress per minas, held, that the same were absolutely void as against Pyle as maker and Sitgreaves as endorser in the hands of a person who was a party to said duress, or of a holder who had notice thereof before he received said notes. And that in an action on said notes by the plaintiffs against Sitgreaves, it was competent for the latter to set up as a defence the duress of Pyle, and especially so where the fact was found as in this case, that the duress was effected through the agency of one of the plaintiffs in this action.

Mr. Justice Paxson delivered the opinion of the court May 7th, 1879.

We are next to consider the question whether the defendant, who is sued as endorser of the notes, can take advantage of the duress practiced upon the maker. In Huscombe v. Standing, Cro. Jac. 187, the defendant having been sued on a bond, on which he was surety for one Street, entered a plea that the bond was obtained by duress of his principal. The plaintiff demurred to this plea, and, without argument, it was held that "it was not any plea for the surety, although it had been a good plea for the said Street; for none shall avoid his own bond for the imprisonment or duress of any other than himself. The same doctrine is recognised in Bacon's Abridg., title Duress A., and 2 Rolle's Abridg. 124. The later authorities are conflicting, with no adjudicated case in Pennsylvania. Mantel v. Gibbs, 1 Brownlow 62; Robinson v. Gould, 11 Cush. 55; Plummer v. The People, 16 Ill. 358; McClintick v. Cummins, 3 McLean 158, and Thompson v. Lockwood, 15 Johns. 259, were cited by plaintiffs as sustaining the doctrine that the duress which will avoid a contract must be offered to the party who seeks to take advantage of it. On the other hand, Strong v. Grannis, 26 Barb. 122, Osborn v. Robbins, 36 N. Y. 365, and Fisher v. Shattuck, 17 Pick. 252, were cited

on behalf of the defendant as sustaining the opposite view. I have examined these cases with some care, and do not regard them as controlling authority on either side. They depend very much upon the pleadings or their special circumstances. I have no doubt of the correctness of the general principle laid down in the older cases that duress, to be a good plea, must be offered to the person who seeks to take advantage of it. As in the case of two joint and several obligors in a bond, a plea by one defendant of duress practiced upon the other would be a bad plea, for the reason that if his signature was obtained without duress of what consequence is it to him that his co-obligor signed under duress? In all cases cited, the duress was either upon the party seeking to avoid the instrument sued upon, or it was known to him. Thus, in Robinson v. Gould, supra, the action was on a note made by A to B to procure the release of C from an unlawful arrest, brought about by B. Here A entered into an independent contract, not as surety, but as principal, with a full knowledge of all the facts, and as the court said, upon a sufficient consideration: "The case, therefore," in the language of the court, "is exactly this: A promise by the defendant, upon a valid consideration, fully assented to by him without coercion or restraint of any kind." McClintick v. Cummins, 3 McLean 158, decides nothing that affects the case in hand. The court said: "It is not necessary to decide this question (the duress). as, from the facts, it does not appear that the imprisonment of Johnson was unlawful, or that he was detained until he executed the notes." Plummer v. The People, supra, was a suit upon a recognizance against the principal and the sureties. The principal was committed by a magistrate in the state of Illinois for a larceny committed in another state. Afterwards, the magistrate, in the absence of the accused, and without proof, made out a second mittimus for an offence committed within the state. The accused, to relieve himself from confinement, gave the recognizance in question. The defendants pleaded duress, and the court below gave judgment in their favor upon the plea. The court above affirmed the judgment as to the principal, and reversed it as to his sureties, saying: "I do not hold that the same facts might not also have been made available by the sureties, at the proper time, and in a proper form of plea, but they can not avail themselves of them by a plea of duress of their principal." This case recognises the doctrine I have already suggested, that duress, as a plea, is bad if the duress set up was upon some person other than the party pleading it. It also appeared that the sureties had knowledge of the duress when they signed the recognizance. This was also the case in Strong v. Grannis, supra, cited by the defendant. Here the action was against two persons as makers of a promissory note; the defence set up was that the note was executed under duress of imprisonment of one of the makers, and to procure his release there-

from, and was signed by the other as his surety. The court held that the surety might avail himself of the duress. This was a case in the Supreme Court. Osborn v. Robbins, supra, was in the Court of Errors and Appeals. The note was given by a son, with his father as surety, in settlement of an arrest upon the charge of rape, under circumstances that indicated an abuse of legal process, for the purpose of oppression. The court held that the surety could avail himself of the duress. This case is not authority to the extent claimed for it by the defendant, for the reason that the surety was the father of the defendant. This is one of the old authorities.

It by no means follows that because duress of another is not a good plea, and that in some instances it may not even avail as a defence, that is can not be set up successfully in any case. Had the defendant, after endorsing these notes, passed them to the plaintiffs and received the money therefor, it is very clear he could not set up the defence of duress of the maker; so if he had endorsed them with notice of the duress, or if the notes were in the hands of an innocent third party for value. In these and many other instances that might be named, the defence referred to would, for obvious reasons, be unavailing. The case in hand, however, differs materially from them and from all cases cited. Here the defendant was the surety of the maker, nothing more, and defends under the broad plea of nonassumpsit. The form of the transaction is not material so long as the contention is between the original parties. The defendant's contract is to pay the notes, if his principal fails to do so; and he may be proceeded against immediately upon such failure. But upon payment of the money he has his remedy over against his principal. It is a recognised doctrine in the law of surety, that whatever discharges the principal debtor, also discharges the surety. There are exceptions to the rule, as where one had signed a joint and several note with a married woman as surety: 1 Pars. on Bills and Notes 244. Nor will this rule apply to cases in which a surety is required, for the very reason that the principal may have a defence that will defeat the claim against him.

In these and the like cases, the surety knows when he binds himself that he has no remedy over. He is not, therefore, misled. The defendant endorsed the notes without any knowledge, or anything to put him upon inquiry, of the duress practiced upon his principal. The result will be, if a recovery is had against the defendant, he will have no redress against the maker, and this by reason of the duress upon the maker, the act of the plaintiffs. He is therefore directly injured by it, and has a right to defend upon that ground. Had he signed the notes with knowledge of the duress, it would have been his own folly, and the consideration being good, the plaintiffs would have been entitled to recover. But they made the mistake of keeping the maker a quasi prisoner in New York by threats of an arrest,

whilst the notes were sent to the endorser for his signature, thus depriving him of his remedy over against his principal. In doing this the plaintiffs overreached themselves.

The judgment is affirmed.

Accord: Schuster v. Arena, 83 N. J. L. 79, 84 Atl. 723; Patterson v. Gibson, 81 Ga. 802, 10 S. E. 9, 12 Am. St. 356.

FOUNTAIN *v.* BIGHAM, APPELLANT

235 *Pa.* 35, 84 *Atl.* 131 (1912).

Opinion by Mr. Justice Mestrezat.

Nathaniel L. Fountain, the plaintiff, and A. J. Dunn, a real estate broker, were jointly interested in real estate speculations in Philadelphia in 1903 and in 1904. To raise funds to carry on a proposed joint enterprise, Fountain, at the request of Dunn, executed a mortgage on his real estate, dated December 9, 1904, with the name of the mortgagee presumably in blank, and left it with Dunn with instructions not to place it without notice to Fountain. In violation of these instructions, Dunn, without Fountain's knowledge or consent, placed the mortgage and received a check for the proceeds, amounting to $1,164.75, drawn to Fountain's order. The check was endorsed with Fountain's name, without his knowledge or consent. Immediately beneath the endorsement of his name, Dunn wrote his own name and deposited the check and received credit for the amount in his bank account. Fountain did not know that the mortgage had been placed until notice in the foreclosure proceedings was posted on his property. Dunn does not deny he still owes Fountain the proceeds of the check.

About May 1, 1906, Dunn was arrested on two informations made by Fountain charging him with obtaining money under false pretenses. Dunn was held by the magistrate for trial and subsequently the grand jury found true bills. In 1909 the cases were tried and the defendant was acquitted.

Dunn, being indebted to Fountain in various sums, including the amount of the check, gave the latter, on September 10, 1906, a bond with warrant of attorney to confess judgment, with Mrs. Mary A. Bigham, his mother-in-law, as surety conditioned for the payment of $2,500 in one day after date. Judgment was entered on the bond on the next day. After two instalments of interest had been paid on the judgment and default as to the third instalment, execution was issued. Mrs. Bigham presented her petition to the court below and, for the reasons therein set forth, obtained a rule to stay the writ, open the judgment and let her into a defense. This rule was made absolute. The case was tried on the plea of nonassumpsit,

and having resulted in a verdict and judgment for the plaintiff, Mrs. Bigham took this appeal. Dunn did not appeal.

Mrs. Bigham alleges that the bond is invalid and not enforceable against her for the following reasons: (a) it was given in consideration of compounding a forgery, (b) the consideration failed because part thereof was the discontinuance of the prosecutions for false pretenses which were tried, (c) the prosecutions were instituted solely for collection of a debt, (d) the bond was executed under the influence of threats and coercion, (e) and part of the consideration was an agreement to settle the prosecutions for false pretenses without leave of the court.

That a contract obtained by duress or acts of coercion or intimidation may be invalidated is well settled. Under such circumstances, the party coerced is not exercising his free will but executing the will of the party who subjects him to the coercion, and, therefore, the instrument bearing his signature is not the contract of the party against whom it is sought to be enforced. Such contracts are procured by duress and may be invalidated. The test of duress is not so much the means by which the party was compelled to execute the contract as it is the state of mind induced by the means employed—the fear which made it impossible for him to exercise his own free will: Williamson-Halsell Frazier Co. v. Ackerman (Kans.) 20 L. R. A. (N. S.) 484. The threat must be of such a nature and made under such circumstances as to constitute a reasonable and adequate cause to control the will of the threatened person and must have that effect, and the act sought to be avoided must be performed by such person while in such condition: Wolff v. Bluhm (Wis.) 60 Am. St. 115. * * *

In this case, however, Dunn is not contesting the validity of the bond, but the present appeal was taken by Mrs. Bigham, his mother-in-law, the surety on the bond. Can she avoid the obligation on the ground of duress exercised on Dunn? The general rule undoubtedly is that the defense of duress is open only to the party upon whom it is imposed, and that a third party who has become surety for the payment of the claim can not avail himself of the plea unless he signed the obligation without knowledge of the duress. There are certain exceptions to the rule as well established as the rule itself. These exceptions include husband and wife and parent and child, and either may avoid his contract made to relieve the other from duress. The exceptions have been extended to grandmother and grandson: Bradley v. Irish, 42 Ill. App. 85; aunt and nephew: Sharon v. Gager, 46 Conn. 189; sister and brother: Schultz v. Catlin, 78 Wis. 611; father-in-law and son-in-law: Snyder v. Willey, 33 Mich. 483; Nebraska Mutual Bond Association v. Klee, 70 Nebr. 383; and brother and brother: Davis v. Luster, 64 Mo. 43. The reason for avoiding a contract on the ground of duress, as appears above, is that the condition of mind of the party upon whom the

duress is imposed is such as to deprive him of the exercise of his free will. Whatever influence produces such a condition of mind will invalidate a contract executed while the influence prevails. The relations between parent and child and husband and wife are so close and tender that the law recognizes that threats to imprison one will have substantially the same effect on the mind of the other, and what will deprive the one of the free exercise of his will or judgment will have a like effect on the other. The reason of the rule will extend it to the case of a mother-in-law and son-in-law where the latter is living amicably with his wife, and the two families are on the usual terms of intimacy and friendship. In holding that duress to a child will relieve a parent from his obligation, Morton, J., in Harris v. Carmody (Mass.), 41 Am. Rep. 188, said (p. 190): "No more powerful and constraining force can be brought to bear upon a man, to overcome his will and extort from him an obligation, than threats of great injury to his child. Both upon reason and upon the weight of the authorities we are of opinion that a parent may avoid his obligation by duress to his child." A mother's affection for her daughter would under ordinary circumstances compel protection against grief and sorrow of the latter by affording relief to the son-in-law. The daughter's happiness depends upon her husband's happiness, and in protecting the one the mother assures the other. This is everyday experience and the law recognizes the fact. In Loud v. Hamilton (Tenn.), 45 L. R. A. 400, the court says (p. 405): "We are inclined to the opinion that where a son-in-law and his wife are living in harmony, and there is nothing to show any estrangement between the father-in-law and the son-in-law, the latter would stand in the same relation, so far as concerns the present question, as would the daughter herself. It is without doubt true that the danger to the son-in-law, and the consequent grief and terror of the daughter, would act upon the father's heart with substantially the same force as if the daughter herself were in danger, or, at least, nearly so."

We think the learned court below should have submitted to the jury with proper instructions whether, owing to the relationship of the parties and the circumstances disclosed by the testimony, the bond was Mrs. Bigham's voluntary act, or was executed under threats of prosecution of her son-in-law which deprived her of the exercise of her free will. The eighteenth and nineteenth assignments are sustained.

The testimony, the exclusion of which is the subject of the third and fourth assignments, should have been admitted. It tended to show, as disclosed by the offers, that the threats "were part of a system of threats and coercion brought to bear upon different members of the families of both defendants for the purpose of inducing the signing of the bond" and "were communicated to her (Mrs. Bigham) and were the inducing cause of her signing this bond, and

was the only consideration therefor." If threats were made for the purpose stated, although not in her presence but with the intention that they should be communicated by others to Mrs. Bigham for the purpose of coercing her into signing the bond, it was competent to show the threats, that they were communicated to her, and what, if any, effect they had in inducing her to sign the bond: Ditto v. Slaughter (Ky.), 92 S. W. Repr. 2; Schultz v. Catlin, 78 Wis. 611; Snyder v. Wiley, 33 Mich. 483. Moyer v. Dodson, 212 Pa. 344, did not warrant the exclusion of the above offers of evidence. In that case, a scire facias on a mortgage, the defendant executed the mortgage after being examined separate and apart from her husband and the officer certified that she signed the instrument of her own free will, and it was conceded that the mortgagee made no threats to the defendant, did not authorize them to be communicated or knew that they would be communicated to her, was not present if they were made to her, and did not know when he accepted the mortgage that they had been communicated to her.

The judgment is reversed with a venire de novo.

Accord: Osborn v. Robbins, 36 N. Y. 365.

Likewise fraud practiced upon the principal by the creditor will discharge the surety. Bennett v. Carey, 72 Iowa 476, 34 N. W. 291; Hazard v. Irwin, 18 Pick. (Mass.) 95; Putnam v. Schuyler, 4 Hun 166; Macey &c. Co. v. Heger, 195 Pa. St. 125.

It has been held, however, that the surety can not avail himself of this defense in the absence of proof that the principal has repudiated the contract. Walker v. Gilbert, 7 Sm. & M. (Miss.) 456; Brown, Slater v. Wright, 7 T. B. Mon. (Ky.) 396, 18 Am. Dec. 190.

SECTION 6. CONTRACT OF SURETYSHIP OBTAINED BY FRAUD, MISREPRESENTATION OR CONCEALMENT

JOHN PIDCOCK ET AL. *v.* SAMUEL BISHOP

3 Barn. & Cress. 605 (1825).

Assumpsit by the plaintiffs, manufacturers of pig iron at Lightmoor, in the county of Salop, against the defendant, a dealer in iron at Bankside, London, upon his guarantee. The guarantee declared upon was contained in a letter of the 16th of December, 1822, addressed by the defendant to the plaintiffs, and was as follows:

"At the request of Mr. Thomas Tickell, I beg to inform you that I will guaranty you in the payment of £200 value to be delivered to him in Lightmoor pig iron."

At the trial before Hullock, B., at the Warwick Lent Assizes 1842, it was proved, on the part of the plaintiffs, that the defendant gave

the above mentioned guarantee, and that in February, 1823, the plaintiffs supplied to Tickell twenty tons of Lightmoor pig iron of the value and price of £82 10s., that they had applied to him for payment, but he was unable to pay any part of the money. On the part of the defendant, Tickell proved that he had formerly been in the iron trade, but had become bankrupt some time before the transaction out of which the action arose; that in the beginning of December, 1822, he applied to John Pidcock, one of the plaintiffs (who managed the business at the Lightmoor works), to supply him with Lightmoor pig iron on credit in the usual way, and told him that if the company would supply him, he would pay him (John Pidcock) ten shillings (beyond the price to be paid to the company) or every ton of iron supplied to him, and which ten shillings was to go toward the liquidation of an old debt due from Tickell to John Pidcock. John Pidcock said he must consult his partners, but that he thought they would not consent to supply the iron without guarantee. It was afterwards agreed between Tickell and John Pidcock that the iron should be supplied, Tickell paying the company the market price, and ten shillings per ton extra to John Pidcock in liquidation of his private debt, and also procuring a satisfactory guarantee for the price of the iron. Tickell accordingly applied to the defendant, who gave the guarantee, but the agreement he had entered into with John Pidcock for the payment of the extra ten shillings per ton was not communicated to the defendant. A bill of parcels was sent with the iron, as follows:

"To 20 tons of Lightmoor pig iron.......£82 10s. to Mr. Pidcock
Debt................................ 10 0

Total................................£92 10s."

On the part of the defendant it was contended that the agreement as to the payment of the ten shillings per ton was a fraud upon the defendant, and that he consequently was not liable upon his guarantee. Hullock, B., thought this no answer to the action, and a verdict found for the plaintiffs for £82 10s., but liberty was given to the defendant to move to enter a nonsuit.

In the following Easter term Denman obtained a rule to show cause why the verdict should not be set aside and a nonsuit entered.

Abbott C. J.: I am of the opinion that a party giving a guarantee ought to be informed of any private bargain made between the vendor and vendee of goods which may have the effect of varying the degree of his responsibility. Here the bargain was that the vendee should pay, beyond the market price of the goods supplied to him, ten shillings per ton, which was to be applied in payment of an old debt due to one of the plaintiffs. The effect of that would be to compel the vendor to appropriate to the payment of the old debt, a portion of these funds which the surety might reasonably suppose

would go toward defraying the debt for the payment of which he made himself collaterally responsible. Such a bargain, therefore, increased his responsibility. That being so, I am of opinion that the withholding the knowledge of that bargain from the defendant was a fraud upon him, and vitiated the contract.

Bayley, J.: It is the duty of a party taking a guarantee to put the surety in possession of all the facts likely to affect the degree of his responsibility; and if he neglect to do so, it is at his peril. It is highly probable that J. Pidcock proved his debt under the commission against Tickell, although that does not appear on the evidence; but, however, that may be, the question in this case depends upon the nature of the bargain between Tickell and J. Pidcock. The defendant might reasonably suppose that the iron was to be supplied to Tickell at the market price, but by the bargain Tickell was to pay, beyond the market price of the iron, ten shillings per ton to J. Pidcock, in discharge of an old debt due to him. Now if the plaintiff had apprized the defendant that there was such a subsisting bargain, he would have known that Tickell would not be able to pay for so much of the iron as he otherwise might have done, and might have declined entering into the guarantee. He gave the guarantee under a supposition that Tickell would be at liberty to apply all his funds, except what were necessary for his support, toward payment of the iron supplied at the regular market price, whereas the plaintiff when he accepted the guarantee knew that Tickell was to pay him not only the market price of the iron, but ten shillings per ton on the iron provided, in extinction of an old debt. The concealment of that fact from the knowledge of the defendant was a fraud upon him, and avoids this contract. Where by a composition deed the creditors agree to take a certain sum in full discharge of their respective debts, a secret agreement, by which the debtor stipulates with one of the creditors to pay him a larger sum, is void, upon the ground that that agreement is a fraud upon the rest of the creditors.* So that a contract which is a fraud upon a third person may, on that account, be void as between the parties to it. Here the contract to guaranty is void, because a fact materially affecting the nature of the obligation created by the contract was not communicated to the surety.†

*Cf. Powers Dry Goods Co. v. Harlin, 68 Minn. 193, 71 N. W. 16, 64 Am. St. 460.

†Holroyd, J., and Littledale, J., rendered concurring opinions.

EDWARD RAILTON *v.* THOMAS G. MATHEWS ET AL.

10 *Cl. & Fin.* 934 (1844).

The respondents, Mathews and Leonard, carried on business in partnership at Bristol; their business extended to Scotland, and was conducted by their agents in Glasgow. Messrs. Rowley and Hickes acted as such agents from January, 1832, to February, 1834, when they dissolved partnership, and it became necessary for the respondents to make a new appointment of agency. Hickes and Rowley then severally applied for the appointment. The respondents gave it to Hickes. The appointment was by letter, dated Bristol, 25 January, 1834, in these terms: "Sir,—We appoint you as our agent for the sale of dye wares, and to collect all our moneys; you finding us security for £3,000, as proposed."

Hickes, upon being so appointed, entered upon the agency, or rather continued the agency held before by him and Rowley. Being afterwards required by the respondents to find the security, he proposed his brother, who resided in England, and the appellant, who was a writer in Glasgow. The respondents agreed to accept the proposed sureties without any communication with either of them; and the necessary bond having been prepared and transmitted to the agent, was subscribed by him and by the appellant at Glasgow in September, and by the other surety in October, 1835. The bond was in the English form, and in the penal sum of £4,000, conditioned that the agent should faithfully conduct himself as the clerk and commission agent of the respondents, and satisfactorily account to them for all moneys received on their account.

In May, 1837, the respondents discovered that Hickes had acted unfaithfully in the agency, and had contrived to apply their moneys to his own use to a large amount. They gave notice of this discovery to the sureties; and subsequently, by the third respondent, their mandatory in Scotland, raised an action against all the obligors in the bond, concluding for count and reckoning of the whole of the agent's actions, and for payment of the £4,000, or such part thereof as might be found to be due by the agent.

The appellant alone defended the action; but before any final judgment was pronounced, he raised an action against the respondents for reduction of the bond, upon various grounds, principally on this: "That the bond was obtained fraudulently by the respondents, and on the procurement thereof they were guilty of a fraudulent concealment of material circumstances known to them, and deeply affecting the credit and trustworthiness of the said Hickes." The libel then, after stating various circumstances importing the respondents' knowledge of Hickes' misconduct and irregularities in the agency during the period of his partnership with Rowley, summed

up the whole statement to this effect: That although at and prior to the time of receiving the bond, the respondents had been made acquainted with the misconduct of Hickes in misapplying the funds of the firm of Rowley & Hickes to his own private purposes; and although, from their own experience of his gross irregularities under the agency, they were perfectly aware that he was unworthy of trust, they totally failed to communicate (to the sureties) the said circumstances or either of them or the existence of any balance on the agency accounts then standing against Hickes; on the contrary, while they accepted and took possession of the bond, they fraudulently suppressed and concealed the said whole facts and circumstances regarding the conduct and irregularities of Hickes, and the state of his accounts, which circumstances were wholly unknown to the appellant, and the respondents, by their whole conduct in the premises, deceived and misled the appellant into the belief that Hickes was in every respect trustworthy, while they well knew the reverse; whereby the bond was obtained by them through fraud and deceit; and the undue concealment of material facts, which they knew, if communicated, would have prevented the appellant from undertaking the said obligation or subscribing the bond, or the respondents were guilty of fraudulent concealment of material circumstances in obtaining the bond, and the same was therefore null and void.

Lord Cottenham: Entertaining an opinion against the judgment pronounced in the court below, if I had felt any doubt upon the subject, or had considered it a case which required more investigation of the facts than it has received, I certainly should have been unwilling to dispose of it without taking time for further consideration; but the facts are so simple, and the points are so free from doubt, that I see no reason why the house should not at once dispose of the case.

The real question is, whether the way in which the learned judge put this case to the jury, and described to them the duty they had to perform, was or was not consistent with and properly applicable to the issue raised for their consideration. The issue, in my opinion, very clearly describes the point which the court wished to have investigated. The terms of the issue must, of course, be construed as they stand; but it is not immaterial to look to the points raised in the pleadings, for the purpose of construction. If there were any doubt upon the meaning of the terms used, I would look to the summons for reduction of the instrument of suretyship; and I find several facts appearing, as having passed between the party who was the subject of the suretyship and those by whom he had been previously employed; and I find the matter stated in these terms: "That the parties totally failed to communicate the said circumstances, or either of them, or the existence of any balance on the agency account then standing against the said George Hickes, to the pursuer

or to the said Henry Williams Hickes; and on the contrary, while they accepted and took possession of the said bond, they fraudulently suppressed and concealed the said whole facts and circumstances regarding the conduct and irregularities of the said George Hickes," etc.

There is an imputation made of direct fraud, a fraudulent intention influencing the acts of the parties, and there is a direct statement of such concealment.

It has not been contended, and it is impossible to contend, after what Lord Eldon lays down in the case of Smith v. The Bank of Scotland, 1 Dow 272, that a case may not exist in which a mere noncommunication would invalidate a bond of suretyship. Lord Eldon states various cases in which a party about to become surety would have a right to have communicated to him circumstances within the knowledge of the party acquiring the bond; and he states that it is the duty of the party acquiring the bond to communicate those circumstances, and that the noncommunication, or, as he uses the expression, the concealment of those facts would invalidate the obligation and release the surety from the obligation into which he had entered.

Now, when the issue in this case was tried, such being the points raised between the parties, we have nothing to do with the evidence in the cause, or the facts proved, or the conclusion to which the jury might or might not have come under the circumstances, but with the question whether the charge which was made to them was such a charge as we conceive ought to have been made to them. The issue for their consideration was, as a matter of fact, "whether the pursuer, Edward Railton, was induced to subscribe the bond of caution or surety by undue concealment or deception on the part of the defenders, or either of them;" raising these two propositions which were raised in the pleadings in the cause, either of which, if found in the affirmative, would lead to the conclusion of the cause.

The question—looking at the terms in which the matter was left to the jury, and the mode in which the learned judge informed the jury they ought to perform their duty—is whether there may not have been a case brought before the jury for their consideration of improper and undue concealment (which I understand to mean a noncommunication of facts which ought to have been communicated), which would lead to the relief of the surety, although the noncommunication might not be wilful and intentional, and with a view to the advantage which the party was thereby to receive. That which I find here extracted from the charge of the learned judge I understand to be one proposition. The learned judge lays it down distinctly that the concealment, to be undue, must be wilful and intentional, with a view to the advantage they were thereby to receive. In my opinion there may be a case of improper concealment or noncommunication of facts which ought to be communi-

cated, which would affect the situation of the parties, even if it was not wilful and intentional, and with a view to the advantage the parties were to receive. The charge, therefore, I conceive, was not consistent with the rule of law; I think that it narrowed the question for the consideration of the jury beyond the limits which the rights of the parties required to have submitted to the consideration of the jury.

Without going further into the law which regulates the rights of these parties than that which was stated by Lord Eldon in Smith v. The Bank of Scotland, we find that in a judgment of this house in the case of an appeal from Scotland, and therefore one peculiarly valuable in the case now under consideration, that has been declared to be the law. The terms used by the learned judge in directing the jury having limited the question for their consideration much more than the rule of law would justify, it appears to be quite clear that this case has not been properly tried, that the exceptions were properly taken, and that this house is bound to pronounce such a judgment as ought to have been pronounced by the court of session.

LORD CAMPBELL: This case has been very satisfactorily argued on both sides; with great brevity, but everything has been argued which could be for the advantage of the clients or the assistance of your lordships; and having listened to all which has been urged on both sides very attentively, I, without the smallest hesitation, come to the conclusion that the bill of exceptions ought to be allowed, and that there must be a new trial.

The question really is, What is the issue which the court directed in this case? "Whether the pursuer, Edward Railton, was induced to subscribe the said bond of caution or surety by undue concealment or deception on the part of the defenders, or either of them?" The material words are, "under concealment on the part of the defenders." What is the meaning of those words? I apprehend the meaning of those words is, whether Railton was induced to subscribe the bond by the defenders having omitted to divulge facts within their knowledge which they were bound in point of law to divulge. If there were facts within their knowledge which they were bound in point of law to divulge, and which they did not divulge, the surety is not bound by the bond; there are plenty of decisions to that effect, both in the law of Scotland and the law of England. If the defenders had facts within their knowledge which it was material the surety should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts, the undue concealment of those facts, discharges the surety; and whether they concealed those facts from one motive or another, I apprehend is wholly immaterial. It certainly is wholly immaterial to the interest of the surety, because to say that his obligations shall depend upon that which was passing in the mind of the party requiring the bond appears to me preposterous; for that would make the obligation of

the surety depend on whether the other party had a good memory, or whether he was a person of good sense, or whether he had the motive in his mind, or whether he was aware that those facts ought to be disclosed. The liability of a surety must depend upon the situation in which he is placed, upon the knowledge which is communicated to him of the facts of the case, and not upon what was passing in the mind of the other party, or the motive of the other party. If the facts were such as ought to have been communicated, if it was material to the surety that they should be communicated, the motive for withholding them, I apprehend, is wholly immaterial.

Then we come to the direction given by the learned judge. He says: "The concealment, therefore, being undue, must be wilful and intentional with a view" (and that is with reference to the motive) "to the advantage they were thereby to receive." Now, according to my notion of the issue, that is an entire misconception of it; according to this direction, although the parties acquiring the bond had been aware of the most material facts which it was their duty to disclose, and the withholding of which would avoid the bond, if they did not wilfully and intentionally withhold them, that is to say if they had forgotten them or if they thought by mistake that in point of law or morality they were not bound to disclose them, then, according to the holding of the learned judge, it would not be a concealment. But the learned judge does not stop there; he goes on, "with a view to the advantage they were thereby to receive," introducing those words conjunctively, and in effect, saying that it was not an undue concealment unless they had their own particular advantage in view. That appears to me a misconception. I will suppose that their motive was kindness to Hickes; to keep back from those who, it was material to him, should continue to have a good opinion of him, the knowledge of those facts; that it was a pure kindness on their part, to prevent those parties entertaining a bad opinion of him, and not from any selfishness, this concealment took place. Although that might be the motive, yet the fact that he was in arrear and had been guilty of fraudulent conduct, and that he was a defaulter, were facts which it was most material for the surety to be acquainted with. If those were held back merely from a kind motive to Hickes, and not at all from any selfish motive on the part of those to whom the bond was to be executed, the effect in point of law would be the same as if the motive were merely the personal benefit of the parties to receive the bond. It appears to me, therefore, that the learned judge has misunderstood the meaning of the issue, and that having told the jury that a concealment to be undue must be wilful and intentional with a view to the advantage which the parties were thereby to receive, that was a misdirection, and that it had a tendency to mislead the jury; that it was wrong in point of law, and that the exception to that direction ought to be allowed.

Interlocutor complained of reversed; bill of exceptions allowed; and a new trial directed.

See also Hamilton v. Watson, 12 Cl. & Fin. 108 (1845); Lee v. Jones, 17 C. B. (N. S.) 482 (1864).

LONDON GENERAL OMNIBUS COMPANY, LIMITED, *v.* HOLLOWAY

2 K. B. 73 (1912)

In the Court of Appeal.

Appeal from the judgment of Lord Alverstone, C. J., in an action tried by him without a jury, as after mentioned.

The action was upon a bond given by the defendant to the plaintiffs, which purported to make the defendant responsible as a surety for the honest and faithful discharge by one Lee, a clerk in the plaintiffs' service, of his duties as such clerk.

In or about 1903 Lee entered into the service of the plaintiffs as a clerk. The plaintiffs' practice in the case of employes who had to receive money for them, as Lee had, was to require a bond by the employe and a surety to secure the fidelity of the employe. In the case of Lee by some accident no such bond was required upon his entering the plaintiffs' service. In 1905 it was discovered by the plaintiffs that Lee had misappropriated money received by him on the plaintiffs' behalf to the extent of £29. The sum so misappropriated was made good by some relatives of Lee other than the defendant. As a condition of retaining Lee in their service, the plaintiffs subsequently required a bond by himself and a surety to secure the honest and faithful discharge by him of his duties, and they gave him a form of bond for execution by himself and his surety. Lee accordingly procured the signature by the defendant, who was a relative of his, of the bond sued upon, by which, after reciting, inter alia, that, at the request of the plaintiffs and Lee, the defendant had agreed to concur in the bond by way of security for the honest and faithful discharge by Lee of his duties, Lee and the defendant became bound jointly and severally to the plaintiffs to the amount of £200 by way of security as aforesaid. This bond was given in 1905. The plaintiffs did not, before the bond was given, inform the defendant of Lee's previous defalcations, and the defendant did not, when he signed the bond, know of the same. In 1909 it was discovered that Lee had subsequently misappropriated money received by him on behalf of the company to the extent of at least £100, and the plaintiffs thereupon brought their action upon the bond against the defendant in respect of the amount so misappropriated. The case

came on for trial before the lord chief justice and a jury, but, after the facts had been proved as above mentioned, it was agreed that the jury should be discharged without giving a verdict and the lord chief justice should deal with the case on further consideration. The lord chief justice on further consideration found that the nondisclosure of Lee's previous dishonesty by the plaintiffs constituted a good defense to the action on the bond.

VAUGHN WILLIAMS, L. J.: Read the following judgment: This is an appeal by the plaintiffs, the London General Omnibus Company, against the judgment of the Lord Chief Justice without a jury. The jury were in fact sworn, and heard all the evidence. The Lord Chief Justice then said to Mr. Salter, the counsel for the plaintiffs: "Now, Mr. Salter, are you going to ask the jury to disbelieve this gentleman?" The witness was the defendant, Mr. Holloway, and he had sworn that, when he signed the bond sued on, he had no idea that there was any previous misconduct by the clerk in respect of whose fidelity he, as a surety, executed the bond. Mr. Salter answered: "I am going to submit that there was no duty to disclose, and next I am going to submit that there was no evidence of overlooking any defalcation subsequently to the deed." The Lord Chief Justice then said: "There is no evidence of any overlooking. I see nothing to be left to the jury." Mr. Clavell Salter answered: "Then the question whether the bond stands, I submit, is a question for your lordship. There was no disclosure. If there was a duty to state it" (i. e., the defalcation of the clerk to the knowledge of the plaintiffs prior to the execution of the bond) "then the duty was not discharged." The Lord Chief Justice found distinctly that there was no fraud on the part of the plaintiffs.

It follows that the only question we have to decide is whether, in the absence of fraud on the part of the person taking the security, nondisclosure by him of any, and, if so, what fact within his knowledge, material for the surety to know, will vitiate the bond. It was suggested during the argument that, although it may be true that, generally, it is not good law, except in the case of policies of insurance, to say that the nondisclosure of a fact within the knowledge of the person taking the security, material for the surety to know will vitiate the security, yet it may be good law in a case where the nondisclosed fact is of such a character that the tribunal before which the question of the vitiation of the bond comes is of opinion that the nondisclosure constitutes a misrepresentation by reason of the nondisclosed fact being inconsistent with a presumed basis of the contract of suretyship, e. g., that the clerk whose fidelity or honesty is the subject of the security has not, to the knowledge of the person taking such guarantee, been guilty of a breach of honesty in the performance of the duties of the very office or service, fidelity and honesty in which is guaranteed. If, for instance, the servant whose fidelity is the subject of the security is, as he was in this case, a clerk

who has to collect and pay over money, it is assumed by both parties to an ordinary contract of suretyship that such a servant is not to the knowledge of the master a man who has been guilty of dishonest dealing with moneys collected by him. Not to disclose such dishonesty is a misrepresentation, it may be innocently made, but still is a misrepresentation, because by nondisclosure the master must be assumed to be contracting on the assumption which I have just mentioned, i. e., the assumption by both parties to a contract of suretyship in respect of the service of such a servant that the suretyship relates to a servant whom the master at the time of taking the security does not know to have been guilty of dishonesty in such service, that is to a presumably honest man, and not a man known to be dishonest. I do not think that the importance of the nondisclosed fact in regard to the duties the subject of the suretyship is necessarily a mere question of law; it may be a question of fact to be decided by a jury or judge sitting alone. The question for judge or jury to put to himself or themselves seems to be, "Would the surety have entered into this contract of suretyship if the nondisclosed fact had been disclosed to him?"

Blackburn, J., in Lee v. Jones (17 C. B. (N. S.) 482, at p. 506), says: "I think that it must in every case depend upon the nature of the transaction, whether the fact not disclosed is such that it is impliedly represented not to exist; and that must generally be a question of fact proper for a jury." He goes on to deal with the question whether in that case there was evidence of fraud to go to the jury, but I do not regard this as a statement that nondisclosure and the misrepresentation to be inferred therefrom must be fraudulent to avoid or vitiate a contract of suretyship, for the only question to be dealt with in that case was on the leave reserved to enter a verdict for the plaintiffs, if there was no evidence of fraud to support the defendant's plea of fraud.

In fact, in many of the common-law cases cited before us, the only question was whether there was evidence to support a plea of fraud, and not whether misrepresentation inferred from nondisclosure would, independently of fraud, vitiate a contract of suretyship. Again in Hamilton v. Watson (12 Cl. & F. 109, at p. 119) Lord Campbell, after dissenting from the proposition of the appellant's counsel that, when a bank takes a security from a person becoming surety for one of its customers, the managers of the bank are bound to communicate to the proposed surety every information which, in relation to the suretyship, it may be material for him to know, and, if such information is not communicated, the surety is released, says, "unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure: and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily,

namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect: and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question and he must gain the information which he requires." Lord Campbell, it is true, takes as his example of what might not be naturally expected an unusual contract between creditor and debtor whose debt the surety guarantees, but I take it this is only an example of the general proposition that a creditor must reveal to the surety every fact which under the circumstances the surety would expect not to exist, for the omission to mention that such a fact does exist is an implied representation that it does not. Such a concealment is frequently described as "undue concealment."

I have dealt with these cases because they were much relied on by Mr. Clavell Salter, but the most important case on the subject seems to be the case of Railton v. Mathews (10 Cl. & F. 934) in the House of Lords. In that case, which was tried in Scotland in the Scottish court, the presiding judge directed the jury that the concealment to be undue must be wilful and intentional, with a view to the advantage the employers were thereby to gain, and the House of Lords held that the direction was wrong in point of law, and that mere noncommunication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, and within the knowledge of the person taking the surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself. Lord Cottenham says (10 Cl. & F. 940): "It has not been contended, and it is impossible to contend, after what Lord Eldon lays down in the case of Smith v. Bank of Scotland (1 Dow 272, at p. 292), that a case may not exist in which a mere noncommunication would invalidate a bond of suretyship." Lord Cottenham then continues (10 Cl. & F. 941): "In my opinion there may be a case of improper concealment or noncommunication of facts which ought to be communicated, which would affect the situation of the parties, even if it was not wilful and intentional, and with a view to the advantage the parties were to receive." Then I find (10 Cl. & F. 943) Lord Campbell saying: "If the defenders had facts within their knowledge which it was material the surety should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts, the undue concealment of those facts, discharges the surety;" and later he says: "The liability of a surety must depend upon the situation in which he is placed, upon the knowledge which is communicated to him of the

facts of the case, and not on what was passing in the mind of the other party or the motive of the other party. If the facts were such as ought to have been communicated, if it was material to the surety that they should be communicated, the motive for withholding them, I apprehend, is wholly immaterial." I see no reason to suppose that Lord Campbell meant any different materiality from that which I have defined earlier in my judgment. The representation to be implied from the noncommunication must relate to facts which the person giving the security had a right to suppose to exist.

I think it right to add that I find it difficult to understand that Pollock, C. B., in North British Insurance Co. v. Lloyd (10 Exch. 523, at p. 535) means when he is dealing with Railton v. Mathews (10 Cl. & F. 934) and Smith v. Bank of Scotland (1 Dow 272), and concludes his judgment with these words: "We think the doctrine laid down by Lord Campbell perfectly correct and applicable to the guarantee in question. The nondisclosure of the circumstance of the change of security, even if it had been material, would not have vitiated the guarantee, unless it had been fraudulently kept back, and there was no ground to impute fraud in fact to the plaintiffs or their agents."

In my judgment, the judgment of the Lord Chief Justice was quite right. I think that the nondisclosure by the plaintiffs of the fact that to their knowledge the clerk had been guilty of defalcations in their service before the bond was executed constituted a representation that he had not been guilty of such dishonesty.

The appeal therefore fails and must be dismissed.

Farwell, L. J.: I am of the same opinion. Whether it would have been necessary at common law to prove fraud in cases like the present I express no opinion, because I am clear that in equity from very early times it was unnecessary for a surety to prove fraud in the case of a material misrepresentation inducing the contract; and, since the Judicature Act, if there is any difference between the rules of common law and those of equity, the rule of equity is to prevail. Sureties have for very many years been favored in equity, and in various cases relief has been given them from time to time on what has been called the clearest and most evident equity—Lord Eldon calls it in one case the "good faith of the contract"—and rules were laid down in equity in favor of sureties, which have been binding for years; for example, the equitable doctrine that entitled a surety to be discharged if the creditor gave time to the debtor, which was acted on in Rees v. Berrington (1795), 2 Ves. 540, where an injunction was granted to restrain an action at law brought by the executors of the creditor who obtained the security and had given time to the debtor.

We have, therefore, to consider whether there is in this case any ground for relief in equity before the Judicature Acts which can

now be granted by the high court. Of course, if there were fraud, fraud unravels all contracts, both at law and in equity, but in a case like the present fraud was not necessary to entitle the surety to relief in equity. Innocent misrepresentation is sufficient, and, although the doctrine by which uberrima fides is required in insurance cases is not applicable to the same extent in suretyship cases, still the surety is entitled to relief on the ground of nondisclosure of matters which ought to have been communicated to him, whether the noncommunication was or was not innocent.

I will not repeat again the passages which Vaughan Williams, L. J., has already read from the judgments of Lord Cottenham and Lord Campbell in Railton v. Mathews (10 Cl. & F. 934). The passage referred to from the judgment of Lord Eldon in Smith v. Bank of Scotland (1 Dow 272, at p. 292) is as follows: "If a man found that his agent had betrayed his trust, that he owed him a sum of money, or that it was likely he was in his debt; if under such circumstances he required sureties for his fidelity, holding him out as a trustworthy person, knowing, or having ground to believe, that he was not so: then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct, even with a view to security against future transactions of the agent." The injury to the surety is the same, whether the nondisclosure was due to fraud or forgetfulness. This is not like the case of a common-law action; it is a case of relief from a contract into which the surety was induced to enter by a misrepresentation made by the person taking the suretyship bond, either wilfully or through forgetfulness. If the element of unfairness is needed to give rise to the equity, it is to be found in the insistence on a contract so induced after the truth is known. The materiality of the fact concealed in this case is to my mind clear. A surety may well be willing to guarantee an employer against defalcations by a servant believed to be dishonest; it is quite another matter if the servant has already been found guilty of defalcations. The surety believes that he is making himself answerable for a presumably honest man, not for a known thief.

There is a wide distinction between a case like the present and the cases which have been cited of guarantees for overdrafts given to bankers, such as Hamilton v. Watson (12 Cl. & F. 109) and Wythes v. Labouchere (5 Jur. (N. S.) & F. 109). Dishonesty may occur, and the guarantee is given to insure against the chance, but guarantees for overdrafts are required for the purpose, and not on the chance of being used. A man may have the misfortune to be robbed by his servant in the course of his business; if he is, it is a mischance; but it is perfectly legitimate and usual for a man to carry on his business on borrowed money, including money borrowed from his bankers by way of overdraft, and the surety knows

this, and becomes surety for the very purpose of enabling him to do so. There is nothing in such a case which the surety does not know as well as any other member of the community, and nothing therefore which needs to be disclosed to him. The surety may well complain "I did not know that your servant was a thief;" but he can not be heard to complain "I did not know your customer had been overdrawing his account or what the nature of his business was." This I take it was what Lord Campbell meant in Hamilton v. Watson (12 Cl. & F. 109) when he said this: "Your lordships must particularly notice what the nature of the contract is. It is suretyship upon a cash account. Now the question is what, upon entering into such a contract, ought to be disclosed? And I will venture to say, if your lordships were to adopt the principles laid down and contended for by the appellant's counsel here, that you would entirely knock up those transactions in Scotland of giving security upon a cash account; because no bankers would rest satisfied that they had a security for the advance they made, if as it is contended it is essentially necessary that everything should be disclosed by the creditor that is material for the surety to know. If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given to state how the account has been kept; whether the debtor was in the habit of overdrawing; whether he was punctual in his dealings; whether he performed his promises in an honorable manner; for all these things are extremely material for the surety to know. But, unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure: and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect: and, if so, the surety is to see whether that is disclosed to him. But, if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires." No surety asked to guarantee a banking account is entitled to assume that the customer of the bank has not been in the habit of overdrawing; the proper presumption in most instances is that he has been doing so, and wishes to do so again. That is a legitimate carrying on of business, and that is what the surety is asked to guarantee. The present case is very different. I think there is no necessity for proof of fraud in such a case, and I am glad to assume that the plaintiffs had forgotten the clerk's pre-

vious defalcations, or that it did not occur to them to disclose these defalcations. For all that, I think they can not enforce the bond which the surety gave in ignorance of them, and I agree that the appeal must be dismissed.

Appeal dismissed.*

HERBERT *v.* LEE ET AL.

118 *Tenn.* 133, 101 *S. W.* 175 (1906).

Mr. Chief Justice Beard delivered the opinion of the court.

The complainant was the general agent for Tennessee of the Provident Saving Assurance Society of New York, and as such had the power to appoint subagents in his territory, who were directly responsible to him for the conduct of the business done by them, while he was liable to his principal for any default on their part. On the 12th of March, 1902, he appointed the defendant Lee, of Knoxville, in this state, as a subordinate agent of the company, and at the same time entered into a written contract with him prescribing his duties and providing for his compensation. Under this contract Lee was to canvass for applications for assurance on the lives of individuals, and, when obtained, forward them through complainant to the society for its action. One of its terms required Lee to collect and "forthwith pay over to the complainant all moneys collected by him for the society, less the amount he was entitled to receive for compensation." It was also provided therein that Lee should furnish bond, with satisfactory sureties, for the faithful performance of his duties growing out of this contract of agency, and that this bond was to be executed as a condition precedent to his employment. Notwithstanding this provision, Lee entered at once upon his agency. Subsequently, however, the complainant, whose residence was in Nashville, Tenn., forwarded to Lee at Knoxville, Tenn., a printed form of a bond in the penalty of $2,000, with direction that he execute it and obtain two sureties upon it. On receiving this, on the 1st of July, 1902, having signed this bond himself and procured E. Buffat and Bruce Davis to execute it as his sureties, Lee returned it to complainant at Nashville, and the same was accepted by him. Subsequently Buffat, one of these securities, died, and the complainant thereupon called upon Lee to execute another bond, and to this end sent him, as in the first instance, a printed form of a bond in the penalty of $2,000, which he procured the defendant Luttrell to sign as his surety, when, having returned it to the complainant, the same was accepted by him. This bond was executed on the 6th of March, 1903, and on the 1st of May there-

*Kennedy, L. J., delivered a concurring opinion.

after the relation between complainant and defendant Lee was dissolved and the latter was discharged, owing at the time to the former some $1,600, arising out of his conduct of this agency. The present bill is filed by the complainant against Lee, the principal, and Bruce Davis, Mrs. Helen Buffat, administratrix of E. Buffat, and James C. Luttrell, to hold them liable for the amount of this deficit. Lee, the principal, made no defense, and by his silence confessed the claim. Davis and Luttrell, as well as the administratrix of the deceased surety, defend, and say, among other things, that at the time of the execution of the two bonds in question Lee was a defaulter to the complainant, and that he and the complainant conspired together for the purpose of misleading the sureties by concealing the fact of this default, and by representing, as is alleged they did, "that the said Dan K. Lee was soliciting agent of the said Hebert, and was conducting a legitimate insurance business as such soliciting agent under the said Hebert."

The court of chancery appeals find as a fact that at the time of the execution of the bond dated July 1, 1902, Lee was indebted to complainant in the sum of $693.20, and from that date to March 6, 1903, the day of the execution of the second bond, his liabilities to complainant increased, until on that day it amounted to $1,711.91, and from this latter date to that of his dismissal it increased in the sum of $182.71, making a total of liabilities accruing under the contract of agency of $2,725.70, less the sum of $1,094.05 paid over from time to time by Lee to Hebert.

It is further found by that court that no communication passed between the complainant and the several sureties signing these bonds, and they signed the same without making any inquiry as to the condition of Lee's accounts, and without any misleading statement authorized by complainant to be made by Lee to them. So it is, if they are discharged from liability on these bonds, it will result from no affirmative action on his part, but from mere inaction, which the law will ascribe as a wrong done by him to these sureties.

We think there can be no doubt that the mere failure upon the part of the complainant to inform these sureties of the fact that their principal, Lee, had fallen behind from time to time in his accounts as agent, until his liabilities had amounted at the execution of these two bonds to the sums stated, would not be sufficient to relieve them from liability. If the present case was that—in other words, if this was a case in which the agent was simply behind in his accounts, and the complainant had failed to communicate, in the absence of investigation or inquiry upon the part of the sureties, this fact to them—we think this would not constitute a ground for resisting a recovery on these bonds. But the court of chancery appeals does not leave the case in that condition. That court finds, in words which admit of no other construction, that at the time of the execution of these several bonds Lee's liabilities grew out of the embezzle-

ment of his principal's funds, and that he was at each of these dates a "defaulter" within the knowledge of complainant.

We think, upon this finding of facts, that a failure upon the part of the obligee to communicate the criminal conduct of Lee, out of which the existing indebtedness occurred, at the time of the making of these bonds, to the sureties upon them, although not inquired of by the sureties, was such conduct on his part as to relieve the sureties from liability. This principle, which it seems to us rests in sound morals, has been announced in many cases, the leading one of which, possibly, is that of Phillips v. Foxhall, L. R. 7 Q. B. 666. This case rested for authority, in part, upon Smith v. Bank of Scotland, 1 Dow 272. In the course of the opinion delivered in the House of Lords in that case, Lord Eldon said: "If a man found that his agent had betrayed his trust, that he owed him a sum of money * * * if under such circumstances he required sureties for his fidelity, holding him out as a trustworthy person, knowing or having ground to believe that he was not, then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct, even with a view to security against future transactions of the agent."

In State v. Sooy, 39 N. J. Law 135, it was held "that a party taking a bond for the future good conduct of an agent already in his employment must communicate to his security his knowledge of the past criminal misconduct of such agent in the course of such past employment, in order to make such bond binding."

In Dinsmore v. Tidball, 34 Ohio St. 411, the action was upon the bond to indemnify the Adams Express Company against loss for the dishonesty or unfaithfulness of an agent. The agent was at the time in the employment of the company, and had been guilty of acts of embezzlement, which fact was not communicated to the surety. In disposing of the question raised by the surety upon this state of facts the court said:

"Admitting that a principal, in accepting a guaranty for the faithful and honest conduct of his agent, is not bound under all circumstances to communicate to the guarantor every fact within his knowledge which increases the risk, yet we think there can be no doubt, either upon principle or authority, that, when an agent had acted dishonestly in his employment, the principal, with the knowledge of the fact, can not accept a guaranty for his future honesty from one who is ignorant of the agent's dishonesty, to whom the agent is held out by the principal as a person worthy of confidence. The failure to communicate such knowledge under such circumstances would be a fraud upon the guarantor."

In Charlotte, Columbia & Augusta R. R. v. Gaw, 59 Ga. 685, 27 Am. Rep. 403, it was held, in applying the principle in favor of a surety where the dishonesty of the agent was discovered subsequent to the making of the bond, and yet was not communicated to the

surety, that such agent, "being under bond to account and pay over daily, can not be trusted with more money at the sureties' risk after dishonesty of the agent had been discovered by the corporation, but may be so trusted so long as the circumstances, fairly interpreted, do not point to moral turpitude, but to a want of diligence and punctuality, rather than to a want of integrity." The same principle is recognized as being eminently sound in Saint v. Wheeler &c. Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210; in Roberts v. Donovan, 70 Cal. 108, 9 Pac. 599; in Atlantic &c. Tel. Co. v. Barnes, 64 N. Y. 385, 21 Am. Rep. 621, and in Newark v. Stout, 52 N. Y. Law 35, 18 Atl. 943.

The rule is otherwise if the acts of the agent, undisclosed to his surety, do not involve moral turpitude, but are such as are consistent with honesty, and only tend to show that the agent is negligent, dilatory, or unskilled. In such case the law does not impose the duty upon the obligee, unasked, to give the surety information of such facts. This distinctive principle is recognized in Screwmen's &c. Assn. v. Smith, 70 Tex. 168, 7 S. W. 793; Atlas Bank v. Brownell, 9 R. I. 169, 11 Am. Rep. 231; Home Insurance Co. v. Holway, 55 Iowa 571, 8 N. W. 457, 39 Am. Rep. 179; Watertown Fire Ins. Co. v. Simmons, 131 Mass. 85, 41 Am. Rep. 196; Domestic Sewing Machine Co. v. Jackson, 15 Lea 418.

It is true, as has been stated, that the complainant had no communication with the sureties upon these bonds, and that they were presented to and signed by them at the instance of Lee, their principal; yet we think this fact does not prevent them from availing themselves of the principle announced in Phillips v. Foxhall, supra, and the other cases to which reference has been made. The bonds were sent out by the complainant to Lee in order that he might obtain sureties upon them, and we can see no distinction between this case and one where the obligee personally presents the bond to the surety and obtains his signature to it, knowing at the time that the agent has been guilty of criminal offense theretofore in the management of his agency, and fails to communicate the fact to the surety. The presentation of the bond, without more, is an implied assurance, at least, that the agent has been guilty of no criminal delinquency in the management of the affairs of his agency; and we think the surety is as well discharged in the one case as in the other, if without any knowledge of the existence of such default he signs the bond.

Nor do we think that the liability of these sureties, in view of the finding that Lee had been guilty of embezzlement of the obligee's funds theretofore, is affected by the recital in these bonds that the sureties undertook to become liable, not only for the debts that might be incurred by Lee after the date of these bonds, but such moneys as he might owe to the obligee growing out of the affairs of his agency at that time. In the absence of the element which we

find as a matter of law goes to the discharge of these sureties, there is no doubt upon these bonds that these sureties would have been liable, not only for debts incurred thereafter by Lee in the course of his agency, but for debts then existing. But the knowledge of the obligee that these debts were the result of dishonest dealings upon the part of Lee, uncommunicated to the sureties, in spite of this recital, can be availed of by the sureties in order to defeat recovery on these bonds. Franklin Bank v. Stevens, 39 Maine 532.

It follows, therefore, that the decree of the court of chancery appeals is affirmed.

Accord: Magee v. Manhattan Life Ins. Co., 92 U. S. 93, 23 L. ed. 699; Howe Machine Co. v. Farrington, 82 N. Y. 121; Domestic Sewing Mach. Co. v. Jackson, 15 Lea (Tenn.) 418.

Mere knowledge on the part of the creditor, uncommunicated to the surety, of the insolvency of the principal debtor at the time the contract of suretyship is entered into will not release the surety. Ham v. Greve, 34 Ind. 18; Sebald v. Citizens' Deposit Bank, 31 Ky. L. 1244, 105 S. W. 130; Farmers & D. National Bank v. Braden, 145 Pa. 473, 22 Atl. 1045.

Sureties on the bonds of public officers will not be discharged by the concealment, on the part of those who are charged with the duty of accepting or approving such bonds, of the principal's prior defalcations. Fidelity & Deposit Co. v. Commonwealth, 104 Ky. 579, 47 S. W. 579, 49 S. W. 467; Cawley v. People, 95 Ill. 249; Independent School District v. Hubbard, 110 Iowa 58, 81 N. W. 241, 80 Am. St. 271; Frownfeiter v. State, 66 Md. 80, 5 Atl. 410; Pine County v. Willard, 39 Minn. 125, 39 N. W. 71, 1 L. R. A. 118, 12 Am. St. 622; Hogue v. State, 28 Ind. App. 285, 62 N. E. 656.

Contra: Sooy v. State, 39 N. J. L. 135.

THE BANK OF MONROE *v.* THE ANDERSON BROS. MINING AND RAILWAY CO. ET AL.

65 *Iowa* 692, 22 *N. W.* 929 (1885).

Reed, J.: We have thought it proper to lay down what we conceive to be the true rule as to the duty of a creditor, who is about to accept a personal security for a debt due him, to inform the surety of facts within his knowledge which would have the effect to increase the risks of the undertaking of the surety. The contract of suretyship, as a general rule, is for the benefit of the creditor, while the surety derives no advantage from it. Hence the law imposes upon the creditor the duty of dealing with the surety at every step of the transaction with the utmost good faith. If the surety applies to him, before entering into the contract, for information touching any matter materially affecting the risk of the undertaking, he is bound, if he assumes to answer the inquiry at all, to give full information as to every fact within his knowledge; and he can do nothing to deceive or mislead the surety without vitiating the agreement. And whether he is bound, before accepting

the undertaking of the surety, and without being applied to by him for information on the subject, to inform him of facts within his knowledge which increases the risks of the undertaking, depends on the circumstances of the case. If there is nothing in the circumstances to indicate that the surety is being misled or deceived, or that he is entering into the contract in ignorance of facts materially affecting its risks, the creditor is not bound to seek him out, or without being applied to, communicate to him information as to the facts within his knowledge. But in such case he may assume that the surety has obtained information for his guidance from other sources, or that he has chosen to assume the risks of the undertaking, whatever they may be. But if he knows, or has good grounds for believing, that the surety is being deceived or misled, or that he was induced to enter into the contract in ignorance of facts materially increasing the risks, of which he has knowledge, and he has an opportunity, before accepting his undertaking, to inform him of such facts, good faith and fair dealing demand that he should make such disclosure to him; and if he accepts the contract without doing so, the surety may afterward avoid it.

See also Remington Sewing Machine Co. v. Kezertee, 49 Wis. 409, 5 N. W. 809; Sooy v. State, 39 N. J. L. 135; Atlantic Trust &c. Co. v. Union Trust &c. Co., 110 Va. 286, 67 S. E. 182.

CARROLL S. PAGE, RESPONDENT, *v.* JOSEPH KREKEY, APPELLANT

137 *N. Y.* 307, 33 *N. E.* 311, 21 *L. R. A.* 409, 33 *Am. St.* 731 (1893).

This was an action upon a guaranty set forth in the opinion, which also states the facts, so far as material.

O'Brien, J.: The judgment from which this appeal is taken was recovered upon a guaranty, signed by the defendant and sent to the plaintiff, a resident of Vermont, by mail. The plaintiff had business transactions with one Bernard Thinnes prior to the guaranty. The latter was a tanner in Brooklyn, and the plaintiff, a dealer in green calf skins, had shipped to him skins at various times to tan and, unless he elected to buy them at a certain price, then to return them, so tanned, to the plaintiff, or deliver them according to his order. The following is the instrument upon which the action was brought:

"Brooklyn, N. Y., March 14, 1889.

"Mr. C. S. Page, Hyde Park, Vt.:

"I am well acquainted with B. A. Thinnes, tanner, of this place. I believe him to be a good tanner, honorable and straightforward in his dealings and attentive to business, and if you will from time to time send hides and skins to him, I hereby guarantee that he

will not convert or misappropriate them, but will well and faithfully tan them, and, if he does not buy and pay you for them within the time agreed upon between you, I agree that he shall deliver them at Rose, McAlpine & Co., New York City, N. Y.

"Notice of your acceptance is hereby waived.

"JOSEPH KREKEY,
"P. O. Address, 248 Freeman Street."

It was shown at the trial that the defendant was an illiterate man, who could not read nor write, except possibly to sign his name. That he signed the paper at the request of Thinnes when in a state of intoxication, and under the false representation that it was an application for a license under the excise law. The principal part of the instrument was in print, probably prepared by the plaintiff, or under his direction. At all events it was presented to the defendant by Thinnes, the representations as to its character were made by him, and when he procured the defendant's signature, he sent it to the plaintiff, who, so far as appears, never met or had any personal transaction with the defendant. The plaintiff's claim against Thinnes, exclusive of interest, was $2,122.79 for skins shipped to him under six written contracts, bearing various dates between May 1, 1889, and July 1, 1889. All of these contracts provided that in case of failure to pay for the goods they should be delivered to the firm of Myers & Gordon. The only question submitted to the jury was whether the defendant, in signing the paper, observed proper care and caution, or was chargeable with negligence. In determining the legal effect of this paper, and the obligation thereby created against the defendant, we must assume that he signed it when intoxicated, that he was unable to read it, that he was ignorant of its contents, and that he fixed his signature to it upon the false representation that it was an application for a license.

There can be no doubt that, as between the parties to this transaction, the instrument was void. It was also invalid in the hands of any person who received it with knowledge or notice of the circumstances under which the defendant's signature was obtained. Sometimes releases, discharges and other instruments are procured by the fraud of a third person, without the knowledge or participation in the fraud of the party to be benefited, who, nevertheless, will not be permitted to reap the benefit of a fraud, though he was himself innocent. The case of Bedell v. Bedell (37 Hun 419) is an example of this class of cases. The decisions in these cases rest upon principles obviously just and reasonable. When the fraudulent act is not imputable to the person claiming the benefit of the instrument, upon the principle of agency, he is generally debarred from enforcing it upon the ground of the fraudulent origin of the paper and the fact that he has lost nothing upon the faith of it. Without examining all the cases cited by the learned counsel for

the defendant, it may be assumed that in other jurisdictions the courts have held that in a case like this the instrument could not be enforced any more than if the signature of the defendant had been forged. That is the principle which is invoked in behalf of the defendant to relieve him from all liability, but it has not received the sanction of the courts of this state.

While it has been quite uniformly held here that an instrument procured by fraud, trick or artifice, or executed by a party in such a state of intoxication as to be incapable of consenting or contracting, is invalid as between the parties to the transaction, these facts do not always constitute a defense as against an innocent person, who is himself free from any fraud or negligence, and who has advanced money or property to another upon the credit afforded by an instrument like this. But even in such a case, the person who has signed the paper is not liable upon it unless it is found that he failed to observe the proper care and caution and was chargeable with negligence in attaching his signature. If he actually signed the paper, though procured to do it by fraud, and is chargeable with negligence, he is liable to an innocent party who acted to his prejudice upon the faith of the instrument. Such cases are not governed by the rules applicable to the bona fide holder of negotiable paper procured by fraud, but by the equitable rule that where one of two innocent parties must suffer, he who has put it in the power of a third person to commit the fraud must sustain the loss. If the defendant is to be held liable in this case, it must be upon the principle that by his misplaced confidence in Thinnes, he enabled him to obtain property from the plaintiff, who is an innocent third party. (McWilliams v. Mason, 31 N. Y. 294; Western N. Y. L. I. Co. v. Clinton, 66 id. 326; Powers v. Clarke, 127 id. 417; Casoni v. Jerome, 58 id. 315; Baylies on Sureties and Guarantors, 214; Burge on Suretyship, 218.)

If this instrument had been a negotiable promissory note the defendant's liability to the plaintiff would depend upon the question of negligence and there does not appear to be any sound reason for a different rule in this case. (Chapman v. Rose, 56 N. Y. 137; Whitney v. Snyder, 2 Lans. 477; National Exchange Bank v. Veneman, 43 Hun 241; Fenton v. Robinson, 4 id. 252.)

Taylor County v. King, 73 Iowa 153, 34 N. W. 774, 5 Am. St. 666; State v. Peck, 53 Maine 284; Johnston v. Patterson, 114 Pa. 398, 6 Atl. 746.

HORACE G. BIGELOW *v.* CORNELIUS G. W. COMEGYS

50 *Ohio St.* 256 (1855).

The original proceeding was a suit on a replevin bond signed by the plaintiff in error as surety for Joseph C. Rich, and given in a certain action of replevin which had been instituted in the common pleas of Hamilton county by said Rich, against Cornelius G. W. Comegys and William Comegys, and in which action judgment had been rendered for the defendant. The name of Solomon Eversull appeared on the replevin bond as cosurety with the plaintiff in error; but on the trial in the superior court it was proved and admitted that the name of Eversull on the bond was a forgery. And the defense set up in the court below, by the plaintiff in error, was, that he was induced to sign the bond upon the fraudulent representations made to him on the part of Rich, that Eversull, who was known to be a responsible man, had already signed the bond as a surety. And it did not appear that either Cornelius G. W. or William Comegys was present at the execution of the bond by Bigelow, or in any way participated in the fraud. The court below rendered judgment on the bond against the plaintiff in error, and to reverse that judgment this proceeding in error is prosecuted.

Bartley, J.: The obligor of a bond can not avoid his liability, by showing that he was induced to execute the bond by the fraud of one of his co-obligors, in which the obligee had no participation whatever, upon the settled rule that where one of two persons must suffer loss by the fraud or misconduct of a third person he who first reposes the confidence and commits the first oversight must bear the loss.

Judgment of the court below affirmed.

SECTION 7. DELIVERY AND ACCEPTANCE

SAMUEL P. P. FAY, JUDGE, ETC., FOR THE BENEFIT OF JOHN BARROWS ET UX. *v.* FRANCIS RICHARDSON ET AL.

7 Pick. (Mass.) 91 (1828).

This was an action on an instrument purporting to be a bond to the judge of probate for the county of Middlesex, made by William Richardson, as principal, and the defendants as sureties, conditioned for the faithful discharge of W. Richardson's duties as guardian of Julia Danforth, a minor. The case was submitted to the court on a statement of facts in substance as follows:

On March 4, 1823, Julia Danforth, a minor and unmarried, aged eighteen years, now the wife of J. Barrows, chose W. Richardson to be her guardian; and on March 5, the judge of probate made a decree appointing him guardian, "he giving bond as the law directs." A letter of guardianship was made out, but not delivered to him, on which the register indorsed, "to be delivered when bond is filed."

At the same court, Josiah Crosby, who had before been the guardian of the minor, settled his guardianship account, to which settlement Richardson gave his assent in writing, as "guardian," which assent was written thereon by the judge. Soon after the appointment, Richardson assumed to act as guardian, and continued to do so till his death, which took place June 15, 1826. On November 24, 1823, he received of Joseph Locke, who had been surety for Isaac Hurd Junior, a former guardian of the minor, $339, and gave a discharge for the same under his hand and seal as guardian.

At the time of Richardson's death, the bond on which this action is brought had not been filed in the probate office, and the letter of guardianship still remained there. The administrator of Richardson found among the papers of the deceased a warrant of appraisal, together with the bond on which this suit is brought, filled up in the handwriting of the judge or register of probate, having the signatures and seals of Richardson as principal, and the defendants as sureties. The bond was executed by the principal and sureties in the presence of witnesses, and the bond was taken away by Richardson.

Richardson's administrator, soon after finding the bond and before the commencement of this action, lodged it in the probate office, with the following endorsement: "The within bond was found by me among the papers of the within-named William Richardson after his decease, in the form in which it now exists. I file this bond in the registry of probate, not intending to withhold any right from any person interested in it, nor by any act of mine to give any rights to any person which he does not now possess. March 20, 1827. Marshall Preston, Administrator." Shortly before William Richardson's death he had assigned property to the defendant Francis Richardson, to indemnify him against his liabilities as surety for William, but the property assigned is not sufficient to indemnify Francis against his other liabilities, exclusive of the claim in this case.

The bond in suit had the following endorsement on it: "March 5, 1823. Examined, approved, and ordered to be filed, &c. S. F. P. Fay, J. Prob."

Parker, C. J.: We have not been able to find any principle or authority to justify us in giving validity to the bond on which this suit is brought.

A bond is a deed, and delivery is essential to a deed. There are

cases of a constructive delivery, but there is no evidence here to bring this case to a resemblance of them. All that appears is, that the paper was signed and sealed by the principal and sureties and was left in the hands of the principal until his death. The act of his administrator can not make a delivery, especially as the memorandum was intended to prevent his act being so considered. For aught we know, it was never intended by the sureties that it should be delivered until sufficient indemnity was given to them by the principal. And it may be, that finding no bond in the probate office, they have on that account omitted to seek for security which they might otherwise have obtained. The certificate on the bond, of approbation by the judge, has no effect, it being manifest that it was made before the bond was signed; for the letter of guardianship remained on the files, with the minute that it was to be delivered when the bond should be filed.

It is certainly a very hard case for the ward, and shows the importance of great care in the probate office; but it would be equally hard on the sureties to hold them liable. At any rate, they insist upon the law, and we can not withhold it. The instrument never became their bond by their definitive act of delivery, and it can not be made so by any power of this court.

Plaintiff nonsuit.

Accord: Fiala v. Ainsworth, 63 Nebr. 1, 88 N. W. 135, 93 Am. St. 420.

But where the obligor parts with all dominion over it, and makes an absolute and unconditional delivery thereof to a third person, with direction to the latter to deliver it to the obligee on the death of the obligor, the delivery is good. Frank v. Frank, 100 Va. 627, 42 S. E. 666.

CHARLES A. STUART ET AL. *v.* JESSE J. LIVESAY

4 *W. Va.* 45 (1870).

Brown, President: This was an action of debt on a bond, purporting to be the bond of three obligors: plea, non est factum. Two of the parties who signed the alleged bond, together with two others, had been, and then were the securities of the principal obligor, in a pre-existing debt, in lieu of which the bond in question was to be given, that the two securities, Wm. R. Stuart and John Stuart, respectively signed the said bond, with a distinct understanding that it was not to be binding on them until it was signed by William H. Shields and Thomas L. Feamster, the other two securities in the original note; that Charles A. Stuart, the principal obligor, stamped and delivered the bond to the obligee, but informed him, at the time, of the understanding aforesaid between himself and William R. and John Stuart, and the obligee then took the bond and said he

would procure the signatures of said Shields and Feamster to it. This evidence was excluded from the jury as inadmissible under the plea of non est factum.

That plea put in issue every fact essential to the existence of the bond. Delivering was an essential fact to such existence. It will be observed that the securities, William R. and John Stuart, did not themselves deliver the bond in question to the obligee; but they respectively signed and delivered it to Charles A. Stuart, the principal obligor, with the understanding that he was not to deliver it as their bond until it should be signed by the two other parties named.

In delivering the bond to the obligee, the principal obligor, Charles A. Stuart, acted as the agent of William R. and John Stuart; and his agency was either general or special. If special, it must be strictly pursued. If general, the agent's act might bind the principals, as to third persons; though not strictly following his instructions, if within the scope of the general power. Had the agent then, in this case delivered the bond absolutely, notwithstanding his particular instructions and special authority, but without notice thereof to the obligee, it might become a question upon which there seems to be much contrarity of decision; but, inasmuch as the obligee was at the time of taking the bond fully advised by the agent of the facts, and took on the terms specified, of procuring the signature required to make it obligatory, nothing can be clearer than that there was not in such case any such delivery of the bond, as the bond of the parties to be bound thereby; and being no such delivery, there was no such bond. The evidence was admissible under the general plea of non est factum, and the court erred in excluding it.

For the error above stated the judgment should be reversed, with costs to the plaintiffs in error, the verdict set aside, and a new trial awarded and the cause remanded for further proceedings, in conformity with the views above indicated.

The other judges concurred.

Judgment reversed.

Accord: Weed Sewing Machine Co. v. Jeudevine, 39 Mich. 590; Dunlap v. Willett, 153 N. Car. 317, 69 S. E. 222; Baker County v. Huntington, 46 Ore. 272, 79 Pac. 187.

STATE OF MINNESOTA v. HENRY YOUNG AND OTHERS

23 *Minn.* 551 (1877).

MITCHELL, J.: It is further urged that the bond in question is void, because it was signed and sealed on Sunday.

It will be noticed that, although actually signed on Sunday, it bears date on Monday; that it was not delivered to nor accepted by the board until Thursday; that, when presented to and accepted by

the board, they were not aware of the fact that it had been signed on Sunday. The mere statement of these facts is, we think, a sufficient answer to the point made by defendants. The objection is not well taken for two reasons: First. The sureties having, by their own act in dating the bond on Monday, represented to the board that it was in fact executed on that day, and they, in reliance upon that representation, having acted upon it, and accepted the bond, and allowed Young to enter upon the duties of his office, the sureties are now estopped from denying the truth of such representation, or showing that it was executed upon Sunday instead of the day it bears date. Biglow on Estoppel, 480 et seq.; Vinton v. Peck, 14 Mich. 287. Second. It is almost an elementary principle, laid down in all the books, that a bond is not "executed" until it is delivered, for delivery is of the essence of a deed. It takes effect only from execution on delivery, and, until delivery, it is not a contract, and is of no further value than the paper upon which it is written. This bond not having been delivered until the following Thursday, the mere signing of it on Sunday does not affect its validity. In the proper and legal sense of the term, it was not "executed" on Sunday, but on Thursday. Com. v. Kendig, 2 Pa. St. 448; Bloxsome v. Williams, 3 B. & C. 232; Lovejoy v. Whipple, 18 Vt. 379; Clough v. Davis, 9 N. H. 500; Hill v. Dunham, 7 Gray, 543; Pierce v. Richardson, 37 N. H. 306.

Accord: Franklin Bank v. Cooper, 36 Maine 179; City of Evansville v. Morris, 87 Ind. 269, 44 Am. Rep. 763; Forst v. Leonard, 116 Ala. 82, 22 So. 481.

Although the date of a bond is presumably the date of its delivery, proof of the actual date of delivery may be introduced to overcome this presumption. Reilly v. Dodge, 42 Hun 646, 4 N. Y. St. 446.

Express acceptance or approval in writing is not necessary. Delivery to and continued possession by the obligee of the bond will raise the presumption that the bond has been accepted. Bostwick v. Van Voorhis, 91 N. Y. 353; Grim v. School Directors, 51 Pa. St. 219; Mallers v. Crane Co., 92 Ill. App. 514; Fiala v. Ainsworth, 63 Nebr. 1, 88 N. W. 135, 93 Am. St. 420; Boyd v. Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986.

Failure to approve the bond of a public officer as required by law will not affect its validity. In Mowbray v. State, 88 Ind. 324, it is said: "Approval of an official bond is not required for the benefit or protection of the sureties; and however important it might be for one asserting his rights as an officer to show his compliance with the requirements of law for induction into office, the statutory provisions for the approval of the securities given by him will in an action on the bond against a surety be regarded as directory, and the complaint thereon, showing a breach, will not be bad though it fail to state that the bond was approved. The fulfilment of the purposes for which such a bond is required by law should not be dependent upon the acts or omissions of other officers."

Accord: Boone County v. Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229; People v. Huson, 78 Cal. 154, 20 Pac. 369.

JONATHAN M. DAIR ET AL. *v.* UNITED STATES

16 *Wall (U. S.)* 1, 21 *L. ed.* 491 (1873).

The case is fully stated by the court.

Mr. Justice Davis delivered the opinion of the court.

The United States brought an action of debt on a distiller's bond, executed by Jonathan M. Dair, and William F. Sauks, as principals, and by James Dair and William W. Davidson, as sureties. There was no dispute as to the right to recover against the principals; but the sureties, who pleaded separately, denied their liability upon the bond; and upon the issues thus raised by them, there was the following special finding by the court: "That said James Dair and William W. Davidson signed said writing obligatory upon the day of its date, as sureties at the instance of Jonathan M. Dair, one of the principals, but that it was signed by them upon the condition that said writing obligatory was not to be delivered to the plaintiff until it should be executed by one Joseph P. Cloud, as cosurety; that said writing obligatory upon its signing by them upon the condition aforesaid, was placed in the hands of said principal, Jonathan Dair, who afterward, without the performance of that condition and without the consent of said James Dair and William W. Davidson delivered the same to the plaintiff. And the court doth further find that, when the bond was so delivered, it was in all respects regular upon its face, and the plaintiff had no notice of the condition." As a conclusion of the law upon these facts, judgment was rendered in favor of the United States against all the parties to the bond, for the amount which it was conceded the principals owed to the government. This writ of error is prosecuted to reverse that decision.

It must be conceded that courts of justice, if in their power to do so, should not allow a party who, by act or admission, has induced another with whom he was contracting to pursue a line of conduct injurious to his interests, to deny the act or retract the admission in case of apprehended loss. Sound policy requires that the person who proceeds on the faith of an act or admission of this character should be protected by estopping the party who has brought about this state of things from alleging anything in opposition to the natural consequences of his own course of action. It is, accordingly, established doctrine that whenever an act is done or statement made by a party, which can not be contradicted without fraud on his part and injury to others, whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be mere matter of evidence. 2 Smith, L. Cas., note to the Duchess of Kingston's case.

Why should not this principle of estoppel, on every reason of justice and good faith, be applied to the covenant on which this action

is founded? The bond was in all respects regular, executed according to prescribed forms, and accepted by the officer whose duty it was to take it, as a completed contract. There was nothing on the face of the paper or in the transaction itself to put the officer on inquiry, or to raise even a suspicion in his mind that a condition was annexed to the delivery of the instrument. The transaction was one of ordinary occurrence in the administration of the revenue laws, and if the officer was satisfied of the sufficiency of the indemnity, there being no circumstances to create distrust that the principal obligors who tendered the bond were not upright men, there was nothing left for him to do but to take it and issue the license. This was done, and the government will be greatly prejudiced if the sureties who were relied on to perform the conditions in case of the failure of the principals, can defeat a recovery on the ground that they did not intend to be bound unless another shared the responsibility, and so told the principal obligors who solicited their signatures. But they did not inform the revenue officer of this condition, and their omission to do so then estops them from setting it up now. The silence which they imposed upon themselves at the time makes their present conduct culpable, for it is not to be doubted that the officer in charge of this business would have acted differently if the information which the principals received had been communicated to him. In the execution of the bond the sureties declared to all persons interested to know that they were parties to the covenant and bound by it, and in the belief that this was so they were accepted and the license granted. They can not, therefore, contravene the statement thus made and relied on without a fraud on their part and injury to another, and where these things concur the estoppel is imposed by law. As they confided in Dair it is more consonant with reason that they should suffer for his misconduct than the government, who was not placed in a position of trust with regard to him.

The case of Pawling v. U. S., 4 Cranch, 219, has been cited as an authority against the position taken in this case; but it is not so, because the additional securities to be procured in that case were named on the face of the bond, and this fact is stated in the plea. If the name of Joseph P. McCloud appeared as a cosurety on the face of this bond, the estoppel would not apply, for the reason that the incompleteness of the instrument would have been brought to the notice of the agent of the government, who would have been put on inquiry to ascertain why Cloud did not execute it, and the pursuit of this inquiry would have disclosed to him the exact condition of things.

In any case, if the bond is so written that it appears that several were expected to sign it, the obligee takes it with notice that the obligors who do sign it can set up in defense the want of execution

by the others, if they agree to become bound, only on condition that the other cosureties joined in the execution.

We are aware that there is a conflict of opinion in the courts of this country upon the point decided in this case, but we think we are sustained by the weight of authority. At any rate, it is clear on principle that the doctrine of estoppel in pais should be applied to this defense.

The judgment of the circuit court is affirmed.

Accord: Taylor County v. King, 73 Iowa 153, 34 N. W. 774, 5 Am. St. 666; State v. Peck, 53 Me. 284; Columbia Ave. Trust Co. v. King, 227 Pa. 308, 76 Atl. 18; Belden v. Hurlbut, 94 Wis. 562, 69 N. W. 357, 37 L. R. A. 853; Sellers v. Territory, 32 Okla. 147, 121 Pac. 228; State v. Potter, 63 Mo. 212, 21 Am. Rep. 440; Tidball v. Halley, 48 Cal. 610; Dun v. Garrett, 93 Tenn. 650, 27 S. W. 1011, 42 Am. St. 937; Fowler v. Allen, 32 S. Car. 229, 10 S. E. 947, 7 L. R. A. 745.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANTS, *v.* HIRAM W. BOSTWICK AND OTHERS, RESPONDENTS

32 *N. Y.* 445 (1865).

The facts in this case are sufficiently stated in the opinion of Judge Campbell to enable the profession to understand the principles decided.

Denio, Ch. J.: The effect of the finding of facts by the judge is, that the covenant on which the suit is brought was signed and sealed by the defendants, and was delivered to the defendant Bostwick; to be by him delivered to the proper officer of the state, when and in case it should be signed by Andrew B. Dickinson, and not otherwise. It was never signed by Dickinson, but was delivered by Bostwick to the auditor without his signature. Bostwick was one of the sureties, and was, moreover, the president of the Bank of Corning, for the benefit of which bank the covenant was made. The question upon these facts is whether the instrument ever became operative as the defendants' deed.

Certain principles having a bearing on the case, are very well established; where a deed is delivered to the party who is the obligee of covenantee, it is impossible to annex a condition to such delivery. The effect of the instrument must then be determined by its language. This is a part of the great conservative rule of evidence, which declares that the terms of an instrument can not be changed by parol proof. If it could be qualified or avoided by proof of words made use of at the time of the delivery, the safeguard which the law attaches to written contracts, would be overthrown; and the effect would be the same as though a party were permitted to show by

parol that the actual contract was different from that which was manifested by the language of the writing.

But until the deed is delivered to the party in whose favor it is intended to operate, or to some person in his behalf and for his immediate benefit, it is in the power of the parties who are eventually to be bound by it, although they have signed and sealed it, to withhold the delivery altogether, or to create an agency for its custody, and to direct its delivery upon any condition or contingency which they may see fit to prescribe. Such an agency may be general or special. If the custodian be the general agent of the signer, in the business to which the instrument relates—as if he be generally authorized to borrow money for him upon securities to be intrusted to him, his delivery of a particular deed, so intrusted, though contrary to his instructions, would bind his principals. But if the agency be special, if it relate only to a particular document which he was authorized to deliver when and only when some event had happened which the party had chosen to prescribe as a condition to the delivery, the placing the paper in the possession of the party in whose favor it was drawn, without the happening of that event, would be an unauthorized act and a nullity, and the instrument would not become the deed of the party who had affixed his name and seal to it. While it remains in the hands of the custodian under such circumstances, and until the condition upon which its delivery depended has been performed, it is said to be in escrow, and is utterly inoperative, and if such custodian violate the terms of the deposit, and deliver the deed without the condition having been performed, such delivery is not the act of the party whose signature and seal is attached, and, as I have said, it is not his deed. It lacks one of the circumstances requisite to the completion of every deed, a delivery to the person in whose favor it is made.

The principles thus far stated are fundamental in the law of written evidence. They lead to the determination of this case in favor of the defendants, unless one or both of the special circumstances relied on by the plaintiffs' counsel take the case out of the scope of those general principles.

It is argued, in the first place, that by committing the instrument, after the defendants had affixed their names and seals to it, to the custody of Mr. Bostwick, one of their number, with authority to deliver it to the auditor, after it should be signed by Mr. Dickinson, he was clothed with the powers of a general agent for them, and could bind them by a delivery not authorized by the instructions, which the other signers sought to make conditions of the delivery. But I am of opinion that he is to be regarded as the special agent of each of the persons who had subscribed the paper: none of them had any connection with the enterprise of borrowing the money from the state for the use of the bank, or any antecedent relations with each other. So far as it appears, it was quite indifferent to

them whether the money was borrowed or not. They had consented to be sureties for its repayment, if Mr. Dickinson would assume the same responsibility, and this was the only concern they had in the matter. The entering into the contract of suretyship was an individual concern with each of the proposed sureties. It required the individual assent of each one before it could be bound; and, in addition to such assent, that he should become individually a party to the deed by which the obligation was created. Until the completion of the deed, they had no connection with each other, no one of them could do any act to commit or affect the other, except by some distinct agreement beyond the general fact that each had consented, subject to the condition mentioned, to become a surety. By imposing the condition mentioned, each person who signed said, in effect, this paper is not to become my deed, unless at the same time it becomes the deed of Mr. Dickinson. They could severally dispense with that condition, and permit a delivery which would make it the deed of those who so consented, but no one of them could dispense with the condition so to affect any other of their number. But the paper must be left in the hands of some one, unless they all came into the presence of the auditor. It might have been committed to a stranger, under the same condition which was attached to it in the hands of Mr. Bostwick, and if this had been done and that person had violated his trust, it can not be pretended that the delivery by him would have been of any avail. It would be the common case of a delivery in escrow with the condition unperformed. If an agent, other than one of the signers, had received, and had taken it to the auditor's office, it may or it may not be that the officer would have been more reluctant to receive it than he was when it was brought by one of the cosureties. Suppose some clerk of the bank, not a party to the instrument, had taken it to the auditor, and had stated that he had been sent with it by the assent of all the parties, to deliver the paper and consummate the loan, he would have been a stranger to the contract within the largest sense of that word, and yet it can not be doubted but that the sureties would be entitled to show that he received it to hold as an escrow until other sureties had signed. The case does not depend upon the degree of likelihood which the character of the agent might furnish to the party receiving the paper, that he really possessed the power which he claimed, but upon the authority actually committed to him. The auditor must be supposed to have known that the character of Mr. Bostwick, as one of the cosigners, and as the president of the bank, did not empower him to do any act which should bind the other cosigners. There was nothing, it is true, in the circumstances specially to put him upon his guard, or to raise a suspicion; but at the same time there was nothing done by the defendants to mislead the officer. To illustrate the position, let us suppose that the bond had been signed and left at the office of the scrivener who drew it, the signers

not having yet concluded to perfect the act by delivery and not intending to do so until they should receive an indemnity, and that one of those who had signed it should clandestinely take it and proceed to the auditor's office, and he, not suspecting any irregularity, had received the delivery and advanced the money. The appearances which in such a case would be presented to that officer would be precisely the same with those existing in this case. He would have received the instrument from the hands of one who would have been naturally enough intrusted with it for absolute delivery; and yet no one would say that it would be the deed of those whose names were subscribed. This shows that there is nothing in the fact that it was presented by one who had signed it, which would authorize the officer to assume that he had authority to deliver it for the others. If he was interested as principal the argument would be the same. The case is distinguishable from a bill or note negotiable to bearer or order; for there an invitation is held out to every one that they may acquire that character by receiving it for value from one who has been intrusted with it. This is a peculiarity of commercial paper.

It has been truly argued that upon these principles great caution would be required of one receiving a sealed instrument from one of several parties purporting to have executed it. If our decision should strongly inculcate the necessity of prudence and care in such transactions, it would not in my opinion be hostile to sound policy. Men are easily enough led into suretyships of this kind, without the establishment of artificial rules to bind them against their consent. After all, business men must and do generally rely much upon the personal character of others with whom they enter into transactions, but in this and similar cases they must be permitted to act upon their own proper peril, and not seek to cast the loss upon another if they misjudge. The principle that where one of two innocent parties must suffer, he who has put it in the power of a third person to commit the fraud must sustain the loss, is not one of universal application, if the language be taken in a popular sense. In such cases the one who claims the benefit of the rule must not himself be guilty of negligence.

In the next place it is argued that the circumstance that the instrument did not contain any names of parties covenanting, except those who had actually signed the paper, distinguishes the case from the rules which have been mentioned. No doubt that was a feature in the paper calculated to avert suspicion; or, in other words, the presence of names in the body of the bond, of persons who had not signed would have been likely to lead to inquiry. But yet it is very certain that such an instrument would, notwithstanding, have been the deed of the parties who had actually signed and delivered the document, or had authorized it to be delivered; and on the other hand, parties who had duly signed and delivered would have been bound, although their names had not been written in the body of the

instrument. If the question were one of greater or less inattention on the part of the auditor, the circumstance relied on would have considerable weight. But it is a question of power in Bostwick to deliver the bond in the state it was, when he had been instructed to withhold the delivery until Dickinson had signed. Nothing short of an estoppel could preclude the defendants from setting up that the delivery was unauthorized. The leaving the paper in a state which would permit Bostwick plausibly to assert that it had been signed by all the persons who were expected to be sureties falls far short of creating an estoppel. The auditor had it in his power to satisfy himself as to his authority and he should have done so. I have looked carefully at the several cases which have been referred to by the respective counsel. The counsel for the state has referred to a case decided by the Supreme Court of Kentucky nearly if not fully in point in his favor; the only distinction being, which I do not think material, that the instrument was left in the possession of the principal in the bond for whose benefit it was prepared. The delivery to him by the surety, though upon condition that another party should sign, was held to be equivalent to a delivery to the obligee, because, as it is said, it enabled him to apply it to the purpose for which it was designed. (Miller v. Parker, 2 Metc. 608.) The cases of Bubler v. Hamilton (2 Dess. Ch. S. C. 226) and Graner v. Neiber (10 Smee. & Mars. 9), also relied on, did not present the precise question, and they were both decided on other grounds. Camberledge v. Lawson (40 Eng. L. & E. 228) arose on the pleadings and was decided against the sureties on the ground that the plea did not set up a delivery of the paper as an escrow, but only that the defendant signed it on the faith that other parties would execute it. It seems to have been conceded that if the facts found in this case had been stated in the pleading, it would have been shown a defense.

The case of Millett v. Parker is not only irreconcilable with principle, but is opposed by a strong current of authority, which sustains the defense which has been interposed.

In Pawling v. The United States (4 Cranch 218), the sureties in an official bond defended on the averment that the instrument was not to have been delivered unless signed by other parties as sureties. It had been left with the principal signer to procure the signatures of the other parties. The point was expressly taken "that the delivery, as an escrow, ought to have been to a third person, and not to Bellinger, the principal obligor." It was held on a demurrer to evidence, the opinion being given by Chief Justice Marshall, that the facts, if proved, constituted a defense. Lovett v. Adams (3 Wend. 380) was an action on a bond with nine sureties. Several of them signed on a condition that it should not be delivered until certain conditions had been performed. The instrument seems to have been left with the others, who waived the conditions and delivered it;

and it was held that the evidence was competent to establish a defense. Fletcher v. Austin (11 Verm. 447); Johnson v. Butler (4 Barn. & Ald. 440); State Bank v. Evans (3 Green (N. J.) 155) and Bibb v. Reed (3 Ala. 38) are all cases sustaining the view I have taken. In the case in New Jersey the bond was delivered to the principal, who delivered it to the obligee, and it was said by the court that it was the same thing as though it had been delivered to a stranger.

I am for affirming the order of the general term and rendering judgment absolute for the defendants.

Judgment affirmed, and judgment absolute for defendants.

Accord: Guild Register & Co. v. Thomas, 54 Ala. 414, 25 Am. Rep. 703; King v. State, 81 Ala. 92; State v. Allen, 69 Miss. 508, 10 So. 473, 30 Am. St. 563.

The rule laid down in the case of People v. Bostwick has met with severe criticism in some cases. See Dunn v. Garrett, 93 Tenn. 650, 27 S. W. 1011, 42 Am. St. 937; Deardorff v. Foresman, 24 Ind. 492; White v. Duggan, 140 Mass. 18, 2 N. E. 110, 54 Am. Rep. 437; Russell v. Freer, 56 N. Y. 71.

FRANK NOVAK ET AL., APPELLEES, *v.* JOSEPH PITLICK, APPELLANT

120 *Iowa* 286, 94 *N. W.* 916, 98 *Am. St.* 360 (1903).

Weaver, J.: The plaintiffs allege that they are associated as an unincorporated body or company, known as the Alert Hose Company, at Iowa City, Iowa; that one J. J. Fryauf was by said company appointed to act as its treasurer for a term of one year from May 1, 1899; that, to secure the faithful performance of said trust, Fryauf executed and delivered to the company a bond in the penal sum of $200, with the defendant as his surety; that said treasurer has failed and refused to account for and pay over the moneys received by him in said office, to the amount of more than $200, and recovery is asked in that sum upon said bond. The bond sued upon is in the following form:

"Know all men by these presents that we, J. J. Fryauf as principal and ——— as sureties, all of Johnson county, state of Iowa, are held and firmly bound unto the Alert Hose Company, of Iowa City, Iowa, in the sum of two hundred dollars, well and truly to be paid to said Alert Hose Company. The condition of this obligation being that whereas, said J. J. Fryauf was on the second day of May, 1899, duly elected to the office of treasurer of said Alert Hose Company, said term beginning the first Tuesday in May, 1899, and expiring the first Tuesday in May, 1900.

"Now, if the said J. J. Fryauf shall pay over or cause to be paid over and returned to the said Alert Hose Company or its authorized

officers all money and property coming into his hands as such treasurer at the end of his term of office, then this obligation be null and void, otherwise to remain in full force and virtue.

"Witness our hands this ——— day of February, 1900.

"(Stamp.)" "(Signed) JOSEPH PITLICK.

The defendant, by answer, denied the claim of plaintiffs generally, and further alleged that he signed the bond upon condition that it should not be delivered until it was signed by the principal, Fryauf, and another surety, but, in violation of said conditions, it was given to the plaintiffs without such signatures, and showing upon its face that it was incomplete, imperfect, and prematurely delivered. On motion of the plaintiffs, more or less of the affirmative allegations of the answer were stricken out. Owing to obscurity of statement in the motion, the precise extent and scope of this order is not clear; but this is not very material, as we think the principal point made by the appellant is available under his denials.

1. The plea based upon the alleged condition that the signature of another surety should be obtained before delivering the bond undoubtedly presents a good defense, if it be shown that the obligee received the instrument under such circumstances as to be chargeable with notice of the condition. Bank v. Boddicker, 117 Iowa 407. It is claimed by appellees that no evidence was produced in support of this defense, and there was therefore no error in failing to submit the same to the jury. As the conclusion announced in the following paragraph is decisive of the appeal, we think it unnecessary to enter upon any discussion of this phase of the record.

2. We proceed, then, to consider the effect of the conceded fact that the bond, though purporting to be the bond of Fryauf, as the principal obligor, and though declared upon by plaintiffs in their petition as having been executed by him, was never in fact so executed. The body of the instrument recites the undertaking of J. J. Fryauf as principal and ——— as sureties, and is signed by Joseph Pitlick alone; and we have first to inquire whether such obligation is enforceable against the surety in the absence of an affirmative showing of a consent on his part to its delivery in that condition. While some variance may be found in the adjudicated cases upon this question, the great weight of the authorities is adverse to the position of the appellees. It is undoubtedly true that one may bind himself for the debt or default of another without joining with him in the same instrument the person for whom he becomes surety or guarantor; but where an instrument is drawn by which one person is to be bound as the principal obligor, and another is bound as surety, and undertakes that his principal shall faithfully discharge the terms of the obligation therein assumed by him, it is almost universally held that the surety can not be held liable upon such contract if it be not signed by the principal. By many authorities such bond is

held to be entirely void, while others hold that the obligee may enforce it by affirmatively showing that the surety consented to its delivery without the signature of his principal. Such an instrument shows its incompleteness upon its face. The first glance at it reveals the absence of the principal party to the obligation, and puts the obligee upon inquiry as to the reason for its delivery in that defective condition. It avails nothing to say that the principal is bound to account for the funds in any event, for, whatever his implied liability by virtue of his fiduciary relation to the obligee, he is not bound by the bond which he has never signed, and no recovery can be had against him thereon. By the express wording of the contract the bond was to be the bond of Fryauf, and it was for Fryauf's performance of the bond which defendant undertook to stand as surety. The obligation of a surety is not to be extended by implication. He is entitled to stand upon the strict terms of his agreement. Walsh v. Bailie, 10 Johns. 180; Gahn v. Niemcewicz's Exrs., 11 Wend. 312; United States v. Boyd, 15 Pet. 187 (10 L. ed. 706; Mid. Nat. Bank v. Richards, 55 Nebr. 682 (76 N. W. Rep. 530). In Bean v. Parker, 17 Mass. 594, a bail bond was given for the release of a debtor under civil arrest, but the instrument was not signed by the principal. Upon action brought against the surety it was held that no recovery could be had. It is there said: "It is essential to a bail bond that the party arrested should be principal. It is recited that he is, and the instrument is incomplete and void without his signature. The remedy of the sureties against the principal would wholly fail or be much embarrassed if such an instrument should be held binding." In Wood v. Sampson, 2 Pick. 24, suit was brought upon an administrator's bond, signed by the surety only, and it was held the action could not be maintained.

The same principle is announced by the Minnesota court in reference to a notary's official bond. Martin v. Hornsby, 55 Minn. 187 (56 N. W. 751). Also to an appeal bond. State v. Haarle, 26 N. W. 906. The defects in these bonds were practically identical with the one now under consideration. In the last-cited case it is said: "It is not the obligation of the principal, for he did not sign it. It did not, so far as appears, bind the sureties, because, from the terms of the instrument, the obligation which they assumed was that of sureties for another, who was principal obligor. It was not, therefore, of effect as a bond of even those who executed it." In Michigan a like rule is observed. Hall v. Parker, 37 Mich. 590; Johnson v. Kimball, 39 Mich. 187. In the latter case Campbell, J., says: "The obligation of a surety can not fairly be extended beyond the scope of his written contract, inasmuch as, under our statute of frauds, his agreement must be in writing; and we think that, presumptively, at least, where the contract calls for the signature of other parties, the instrument is to be deemed inchoate and imperfect until they also sign it. * * * Where several names are written

as obligors, and one of them is called upon to sign it, he does so upon an implied understanding that he can, in case of being held responsible, not only have his right of contribution, but a further right to have it capable of proof and enforcement according to the terms of the contract, as it purports to be drawn up. * * * And if it is claimed that he has waived them or become estopped from relying on them, the burden of proof ought not to be laid upon him to show that there has been no variation, but upon the plaintiff to show what is substantially a new contract."

In a late decision the Supreme Court of Massachusetts reaffirms the case of Bean v. Parker, already cited, saying: "An instrument like that in suit ordinarily is and should be executed by all the intended parties. It was for plaintiffs to show that, although not thus executed, the defendant had consented to its delivery under such circumstances that it would bind him, even if it were inoperative and invalid as against the principal." Goodyear Co. v. Bacon, 151 Mass. 460. Many other courts have acknowledged the correctness of this principle. "If the bond contains the names of other obligors, and is delivered without the signature of all, the obligee must inquire whether those who have signed consent to its being delivered without the signature of the others." Fletcher v. Austin, 11 Vt. 447. See also Hall v. Smith, 14 Bush 604; Board v. Sweeney, 1 S. Dak. 642; Sacramento v. Dunlap, 14 Cal. 421; People v. Hartley, 21 Cal. 585; Nash v. Fugate, 24 Grat. 213; Markland v. Kimmel, 87 Ind. 572; Sharp v. United States, 4 Watts 21; Duncan v. United States, 7 Pet. 435; Pawling v. United States, 4 Cranch 219; Clements v. Cassilly, 4 La. Ann. 380.

Other cases, while denying that a bond which has been delivered without being executed by all the parties named in the body of the instrument is presumptively void, adhere to the rule that its incomplete appearance has the effect to cast upon the obligee the burden of showing that the delivery was made by the consent of the party signing it, or under circumstances estopping him to deny such consent. Mullen v. Morris, 43 Nebr. 591; Midland Nat. Bank v. Richards, 55 Nebr. 682; Bank v. Evans, 15 N. J. L. 155. These holdings are in no manner inconsistent with the rule announced by us in Benton County Bank v. Boddicker, 105 Iowa 548, and sustained by many eminent authorities, that where the bond is perfect on its face, and the obligee receives it without notice of any condition attached to its execution by a surety, it is binding upon the latter, notwithstanding his signature was obtained upon the assurance that others were also to join in the obligation. Carter v. Moulton, 51 Kans. 9; State v. Allen, 69 Miss. 508; Dair v. United States, 16 Wall. (U. S.) 1; McCormick v. Bay City, 23 Mich. 457.

Under the law as indicated by the authorities we have cited we think there can be no recovery upon the bond in suit in the absence of an affirmative showing by plaintiffs that the surety consented to

its delivery in its incomplete and defective condition. From this conclusion it follows that the trial court erred in charging the jury, as a matter of law, that the bond was binding upon the appellant, rendering him liable to the amount of the penalty therein named for any default of Fryauf as treasurer. Most of the errors assigned upon the introduction of testimony are governed by this conclusion, and need not be separately considered. Other assignments pertain to questions not likely to arise upon a retrial.

The judgment of the district court is reversed.

See also Pawling v. United States, 4 Cranch (U. S.) 219, 2 L. ed. 601; Allen v. Marney, 65 Ind. 398, 32 Am. Rep. 73; Hessell v. Johnson, 63 Mich. 623, 30 N. W. 209, 6 Am. St. 334; State v. Churchill, 48 Ark. 426, 3 S. W. 352, 880; Cutler v. Roberts, 7 Nebr. 4, 29 Am. Rep. 371; Ney v. Orr, 2 Mont. 559; Husak v. Clifford, 179 Ind. 173, 100 N. E. 466.

In those jurisdictions holding that the failure of the principal to sign the bond does not affect its validity, it is held that the absence of such signature by the principal will not operate as notice of any conditions attached to its delivery, although the failure of one who is mentioned as surety in the bond to execute it will have that effect. Star Grocery Co. v. Bradford, 70 W. Va. 497, 74 S. E. 509, 39 L. R. A. (N. S.) 184.

For other matters in the form of the obligation which will put the obligee on notice, see Hendry v. Cartwright, 14 N. Mex. 72, 89 Pac. 309, 8 L. R. A. (N. S.) 1056.

SECTION 8. COMMENCEMENT AND DURATION OF LIABILITY

ABRAHAM MYERS *v.* THE UNITED STATES

1 *McLean* 493 (1839).

Opinion of the Court

The action in the district court was brought on a penal bond for fifteen hundred dollars, given by Peter Wilson, Abraham Myers, and others, securities, conditioned that the said Wilson should faithfully perform his duties as receiver of public moneys, at Steubenville, in the state of Ohio. The bond was dated 22d September, 1820. The breach assigned is, that Wilson received a large sum of money, to wit, the sum of fifteen thousand dollars, which he failed to pay over or account for to the government, as he was bound to do.

The bond on which this action was brought is dated 22d September, 1820, and the first question that arises is, whether the sureties in this bond can be held liable for any prior defalcations of Wilson, the receiver. The answer is, that the sureties are bound for a faithful discharge of the duties of receiver, from the date of the bond; and not that he had performed those duties. If the government intended the bond to cover the official responsibility of Wilson in

time past, as well as for time to come, its language would have been adapted to such an object; and the sureties would have had due notice of the extent of their liability.

The obligation of a surety is a matter of strict law, and can never arise from implication. The bond must speak for itself, and its language can never be extended or altered, to the injury of the surety.

But it is insisted that the transcript shows a large balance due at the date of the bond, which the receiver was bound to pay over to the government; and a failure to do this is a failure of official duty, for the due performance of which the sureties in this bond are bound.

The transcript, it is true, shows that Wilson was a defaulter in a large sum at the time this bond was executed, and which he should have paid over before its execution to the government.

Now can the sureties to this bond be held responsible on this evidence?

The receipt of the money by the receiver may be admitted, but suppose, as the fact probably was, that he had applied it to objects of a private nature before the execution of the bond, would any one contend that the sureties are responsible for such misapplication of the public money?

The default in this view was complete before the date of the bond, and the fund was misapplied. There could, therefore, be no liability of the sureties under such circumstances, unless the bond provided expressly for the case. And unless there was more evidence before the jury than that which is found on the transcript, the defendant below could not be charged with any part of this defalcation.

It may be admitted, if the government had shown that the whole or any part of the balance due, at the date of the bond, came into the hands of the receiver subsequent to the date of the bond, the sureties might be held responsible for the payment of the amount received. Or if it had been shown that the balance was in the hands of the receiver, not presumptively but in fact, when the bond was given, there would be ground on which to insist that the sureties are liable. But there appears to have been no evidence to the jury that the balance was in the hands of the receiver at the date of the bond; or that it came into his hands subsequently.

I am aware that this might have been set up as a matter of defense. But I am inclined to think that it is not incumbent on the defendant to show the misapplication of moneys received, and for which the receiver was in default prior to the execution of the bond.

It appears to me that when the government seeks to make a surety responsible for a balance due, at the time the bond is executed, it must show the money was in the hands of the principal when the surety became bound.

The court in the case of Farrar & Brown v. The United States, 5 Peters 289, say: "We feel no difficulty in affirming that for any sums paid to Rector prior to the execution of the bond, there is but one ground on which the sureties could be held answerable to the United States, and that is on the assumption that he still held the money in bank or otherwise. If still in his hands, he was, up to that time bailee to the government; but upon the contrary hypothesis, he had become a debtor or defaulter to the government and his offense was already consummated. If intended to cover past dereliction, the bond should have been made retrospective in its language. The sureties have not undertaken against his past misconduct." And the court held that the court below erred in not suffering the defendant to prove the misapplication of the money before the date of the bond. But the question was not raised whether it was not incumbent on the government to show the amount of money in the hands of the surveyor at the date of the bond. This evidence is essential to the liability of the surety; and I am inclined to think that proof of the defalcation only does not fix this liability. The default being prior to the bond, the government must show that the money was in the hands of the principal at the date of the bond. And this upon the simple ground that the surety does not undertake to account for prior defaults, but for those which may subsequently occur.

In the case cited the fund was placed in the hands of the surveyor for disbursements, but in the case under consideration the receiver was bound to pay over the money, which he failed to do; and for such failure I hold a subsequent surety is not bound, unless the bond be retrospective in its conditions, or the money is shown to be in the hands of the receiver when the bond was given.

In 9 Cranch 227, 229, it was decided that the sureties were not bound for moneys received by a marshal before the date of the bond.

Upon the whole the judgment of the district court is affirmed.

Accord: Bartlett v. Wheeler, 195 Ill. 445, 63 N. E. 169; United States v. Boyd, 15 Pet. (U. S.) 187, 10 L. ed. 706; Township of Paw Paw v. Eggleston, 25 Mich. 36; Bissell v. Saxton, 77 N. Y. 191; Manhattan Rolling Mill v. Dellon, 113 N. Y. S. 571; Pritchett, Baugh & Co. v. Wilson, 39 Pa. St. 421; National Bank of Commerce v. Rockefeller, 174 Fed. 22; Morrell v. Cowan, L. R. 7 Ch. Div. 151; Townsend v. Everett, 4 Ala. 607.

Where it appears by the guaranty that it was intended to embrace past as well as future transactions such an effect will be given to it, notwithstanding the fact that the surety was ignorant of the existence of a debt at the time of the execution of the guaranty. People v. Lee, 104 N. Y. 449, 10 N. E. 884.

Bonds given in the course of the administration of estates are subject to a different rule than that of Myers v. United States. The law requires the administrator to faithfully administer the estate which shall at any time come into his hands as administrator and his bond is given to secure the performance of this duty. It is generally held then that the bond covers all the assets, whether they come into the hands of the administrator before or after the execution of the bond, and the sureties will be liable for any conversion of such assets before as well as after the bond has been executed. Scofield v.

Churchill, 72 N. Y. 565; Choate v. Arrington, 116 Mass. 552; Brown v. State, 23 Kans. 235; Pinkstaff v. People, 59 Ill. 148; Foster v. Wise, 46 Ohio St. 20, 16 N. E. 687.

IDA COUNTY SAVINGS BANK, APPELLEE, *v.* C. J. SEIDENSTICKER AND A. F. KNEPPER, H. A. KNEPPER AND MARGARET KNEPPER, AS EXECUTORS OF THE WILL OF F. C. KNEPPER, DECEASED, APPELLANTS

128 *Iowa* 54, 102 *N. W.* 821, 111 *Am. St.* 189 (1905).

Action at law upon a bond given by the defendant Seidensticker for the faithful performance of his duties as cashier of the plaintiff bank. Judgment for plaintiff upon a directed verdict, and the defendant surety appeals. Since the appeal was taken, the surety F. C. Knepper has deceased, and his representatives have been substituted as appellants. Reversed.

Weaver, J.: In the year 1893 the First National Bank of Ida Grove, Iowa, ceased to do business, and transferred its assets to one J. T. Hallam. Soon thereafter Hallam, who had been conducting a private bank, united with others to organize the plaintiff bank, himself becoming the owner of something more than two-thirds of the capital stock. The defendant C. J. Seidensticker, who had been employed in the national bank, and subsequently by Hallam in his private bank, became the plaintiff's first cashier, and as such gave the bond now in suit, with the defendant F. C. Knepper as his surety. The condition of the bond is in the following words: "The condition of this bond is such that, Whereas, the said Chas. J. Seidensticker has been elected cashier of the Ida County Savings Bank, within Ida Grove. Now, if he shall well and truly perform the duties of the office of cashier, according to the by-laws of said bank, and the law of the state of Iowa governing savings banks, and exercise all reasonable care and diligence, and the preservation and lawful disposal of all moneys, books, papers and securities belonging to the bank, then the bond to be void, otherwise of force and effect." At the beginning of each bank year the board of directors re-elected the cashier, and he continued in the position until March, 1897, when he absconded. During all the period of Seidensticker's service in this capacity Hallam, who has since died, was the president and the active superintendent or managing officer of the bank. On November 20, 1897, the plaintiff brought an action upon said bond, alleging that, in violation of his duties as cashier, Seidensticker had taken, appropriated and converted to his own use moneys of the bank to the aggregate amount of $7,959.41, for which sum judgment was demanded against him and his surety. The surety

denies liability on various grounds, to which reference will be made in the progress of this opinion. A reversal of the judgment entered below upon a directed verdict is claimed upon numerous alleged errors.

1. The first question to be considered is whether the bond sued upon created a continuing obligation upon the surety so long as Seidensticker might be retained as cashier of the bank, or is to be limited in time to the first year of said cashier's service. To properly answer this inquiry, reference to the statute governing savings banks, and to the facts and circumstances attending the giving of the bond, becomes necessary.

The statute invests savings banks with the power to appoint such officers, agents and employés as the business transacted by them may require. Code, § 1844. It also provides for the annual election of a board of directors (§ 1846) and makes it the duty of such board at their first meeting, and as often thereafter as the by-laws require, to elect from their own number a president and vice-president for the ensuing year, and appoint a treasurer or cashier and such other officers and employés as may be required, who shall hold their office during the pleasure of the board, and give such security for the performance of their duties as may be required of them by the by-laws (§ 1845). The by-laws of the plaintiff bank, as offered in evidence, repeat in substance the statutory provision above cited, and provide in general terms that the president, cashier and employés of the bank shall give bonds in such sums, with sureties, as the board of directors shall approve. The board is also given power by a majority vote to remove at any time any or all of the officers or employés and appoint others in their stead. In actual practice the board adopted the plan of electing or appointing the cashier annually at the time of the regular annual election of president and vice-president. The records of the corporation show that the first regular meeting of the board of directors was held on May 30, 1893, and that Charles J. Seidensticker was "appointed cashier until the next annual election." At the same meeting it was voted that the president be required to give bond in the sum of $50,000, and the cashier in the sum of $10,000, to be approved by the board. The cashier's salary was at the same time fixed at $1,000 per year until further ordered. The second annual meeting occurred on May 31, 1894. The record of this meeting recites that a motion that Charles J. Seidensticker "be elected cashier for the next year" was carried. At the third annual meeting, held June 4, 1895, it is recorded that a motion that "Charles J. Seidensticker be appointed cashier for the ensuing year" was carried, and that his salary was fixed at $840 per year. No record seems to have been preserved of the annual meeting of the year 1896. Seidensticker testifies that such a meeting was held and he was again reappointed for the ensuing year, and this is not disputed. These four successive appointments cover the entire

period of the cashier's service. The bond in suit was executed after the first election, and was approved and accepted by the board of directors about June 27, 1893. It was never renewed, nor was any other bond or security for the performance of his duties ever required of the cashier while he remained in the bank's service. It is the contention of the surety that the bond is to be construed with reference to the term of the appointment or election of Seidensticker to the office of cashier. In other words, the proposition is that Seidensticker having been appointed to serve in that capacity for the period of one year, subject, of course, to the reserved right or power of the board of directors to remove him at an earlier date, the bond given to secure his faithful discharge of the duties of his office will not operate to bind the sureties for defalcations occurring after the expiration of such term and under another and different appointment. The question is one upon which there is some apparent confusion in the cases, but, when closely examined, the want of harmony is apparent rather than real.

It is elementary that a surety, especially one who assumes that relation as a mere matter of accommodation to one or both of the principal parties, is entitled to rely upon the strict terms of his contract, and his liability will not be extended or enlarged by implication. Miller v. Stewart, 9 Wheat. 680. It is equally well settled that, in the absence of stipulations making the contrary intention clearly and unequivocally apparent, the obligation of a surety upon an official bond does not extend beyond the term or period of service to which such officer had been appointed or elected when the bond was given. Wapello Co. v. Bigham, 10 Iowa 40; Fresno Co. v. Allen, 67 Cal. 505; South Carolina Society v. Johnson, 1 McCord (S. Car.) 41, 10 Am. Dec. 644; Chelmsford Co. v. Demarest, 7 Gray 1; Moss v. State, 10 Mo. 338; Bigelow v. Bridge, 8 Mass. 275. But there is a class of cases in which the application of the last-mentioned rule has given rise to differences of opinion. They relate, generally speaking, to officers for whom the law which authorizes their appointment has fixed no definite term of service, and are removable at any time at the pleasure of the appointing power, but are nevertheless appointed and reappointed to successive definite terms, as was done in the case at bar. A line of decisions is to be found which appear to hold with more or less strictness that a bond given by such officer upon his first appointment is a continuing obligation upon the surety, unless the contrary intention is clearly manifest in the terms of the instrument. The case most often cited in support of this holding is Amherst Bank v. Root, 2 Metc. (Mass.) 522; which was an action upon a cashier's bond. The statute of Massachusetts at that time authorized the board of bank directors to appoint a cashier and other officers, who should "retain their places until removed therefrom or others are appointed in their stead." The defendant Root was

appointed cashier from year to year for several years, but gave no bond, save the one made to the bank upon his original appointment. The bond recited generally that Root had been appointed cashier, and was conditioned upon his faithful performance of the duties of the position. The sureties were directors of the bank. It was held by a divided court that an action would lie upon the bond for the cashier's default, which occurred in the later years of service. The majority opinion concedes the general rule that the bond of an officer appointed for a fixed or limited term imposes no obligation on the surety for the conduct of his principal under a reappointment, but gives controlling force to the statute providing that a cashier "shall retain his office until removed therefrom," and shall give bond "conditioned for the faithful performance of the duties of his office." "This provision," the opinion says, "regulates the office of cashier, and fixes the term by which it is held," and upon this theory of the effect of the enactment it was decided that the bond must be held to have been given to cover the entire time of the cashier's service until he should be "removed" or another be "appointed in his place."

Even if we accept this construction as correct, we think our statute, which provides that the cashier shall hold his office "at the pleasure of the board," is not the equivalent of the Massachusetts act. A statute which unequivocally gives the cashier the right to retain his office until removed may, without violence to the meaning of these words, be held to imply an absence of authority in the board of directors to require an annual appointment or reappointment of a cashier whose services are found to be satisfactory, while a provision that he shall hold his office at "the pleasure of the board" does not have that obvious effect. It is a fair construction of this provision to say that, while retaining the right to remove him at any time, the board may properly pursue the plan of appointing or employing a cashier for a year at a time, and make the annual reappointment a condition precedent to his right to continue in such position.

That the majority opinion in Amherst Bank v. Root is made to turn upon the construction of the local statute has been distinctly held by the Massachusetts court in Richardson School Fund v. Dean, 130 Mass. 242. In that case the charter of a corporation provided that its trustees should be chosen for a period of three years, and that other officers should be appointed as the by-laws might provide. No by-laws were adopted, or, at least, none appear in the record; but it was shown that "by the uniform practice" of the corporation its treasurer had been chosen at regular triennial elections "for the ensuing term of three years." Under these circumstances it was held that the bond given by the treasurer under his first appointment, though not containing any express time limit to its operation, was not a continuing obligation, and did not bind the surety for defal-

cations occurring after the expiration of the first term of three years. The same construction is placed upon Amherst Bank v. Root in Welch v. Seymour, 28 Conn. 294; Chelmsford Co. v. Demarest, 7 Gray 1, and Bank v. Briggs, 69 Vt. 12. The case of Exeter Bank v. Rogers, 7 N. H. 21, is somewhat less in point than the Root case. While, under the peculiar circumstances there disclosed the bond was held to continue through a long series of years, the opinion appears, impliedly at least, to except from the rule there approved cases of the character of the one before us. It says that "when an office is held at the will of those who make the appointment, and is not limited to any certain term, then the bond is presumed to be intended, if nothing appear to the contrary, to cover all the time the person appointed shall continue in office under the appointment." As the cashier in the present case, though holding at the will of the directors, nevertheless held by an "appointment limited to a certain term," it would seem to follow that his bond given upon such appointment is not within the rule of the New Hampshire precedent.

Of the other case cited by the appellee in this connection we will speak only of Westervelt v. Mohrenstecher, 76 Fed. 118, which was an action upon the bond of the cashier of a national bank. It was there decided that the annual re-election of the cashier did not operate to terminate the obligation of his bond given at the time of his first appointment. This holding was based in part upon the act of congress which makes the duration of service of bank officers indefinite and subject to be terminated at the will of the directors, and in part upon the peculiar language of the bond, which was expressly conditioned for the faithful performance of duty by the cashier "for and during all time he shall hold the office of cashier of the said bank." This, it will be noted, is a much broader and more sweeping obligation than is expressed in the bond in suit. It may also be said, with reference to the last-cited case, that it seems, in argument, to carry the idea of the continued obligation of the surety upon such bonds beyond the limit expressed in any of the other precedents called to our attention. In an action upon a similar bond the Vermont court carefully reviews the authorities and reaches the opposite conclusion. Speaking of the annual election of an officer who is subject to removal or displacement at the will of the appointing power, the opinion well says:

"The provision that an officer may be dismissed at pleasure can apply as well to an appointment limited to a given time as to an appointment to an indefinite period. It does not impliedly prohibit the fixing of a time beyond which the appointment shall not extend. Its effect is simply that the appointment, however made, shall be terminated at the pleasure of the appointing power. An appointment may be made which, if not previously terminated by the action of the board of directors, will continue for the period designated and expire by its own limitation. There is nothing in the statute which requires us

to hold that this surety contracted with reference to an unlimited period when the appointment was in terms for a specified time. The cashier's re-election was something more than a meaningless expression of the pleasure of the directors; it was the filling of a vacancy occasioned by the limitation of their previous appointment."

It is difficult to avoid the force and justice of this reasoning. It finds support also in the following cases: O'Brien v. Murphy, 175 Mass. 255; Bigelow v. Bridge, 8 Mass. 275; Union Co. Vas. Inst. v. Ostrander, 163 N. Y. 430; Moss v. State, 47 Am. Dec. 116; Bank v. Hunt, 72 Mo. 597; South Carolina Society v. Johnson, 1 McCord (S. Car.) 41, 10 Am. Dec. 644; Mutual Loan & Building Assn. v. Price, 16 Fla. 204; Treasurer v. Mann, 34 Vt. 371; Citizens' Loan Assn. v. Nugent, 40 N. J. Law 215; Wardens v. Bostwick, 5 B. & P. 175; Kilson v. Julian, 4 E. & B. 853; Liverpool W. Co. v. Atkinson, 6 East. 507; Arlington v. Merrick, 2 Saund. 403; Peppin v. Cooper, 2 B. & A. 431; Theobold on Principal and Surety, § 82; M. & M. Co. v. O. F. Hall Assn., 48 Pa. 446; Curling v. Calkeen, 3 M. & S. 502.

Few, if any, of these cases are quite parallel in their facts with the one we are considering, but they amply sustain the rule, to which we adhere, that a cashier's bond which does not expressly limit the period of its operation must be read in connection with the terms of the appointment under which such cashier holds his office, and, if such appointment be for a definite period, the bond ceases to be effective upon the expiration of the term so designated. The reasoning upon which this rule is based seems to be sound, and the rule itself places an undue burden upon no one. He who is requested to become surety upon the bond of a neighbor or friend who has been made cashier of a bank under an appointment expiring in one year or other short period may willingly do so where he would very reasonably refuse to assume an obligation which might continue for a lifetime. Before assuming the obligation, the surety may reasonably inquire as to the time and terms of his principal's appointment, and rely upon the actions of the corporation in that respect. To hold otherwise is to set a trap for the unwary. Says Chancellor Kent:

> It is a well-settled rule, both at law and in equity, that a surety is not bound beyond the present terms of his contract. This rule is founded upon the most cogent and salutary principles of public policy and justice. In the complicated transactions of civil life the aid of one friend to another in the character of surety or bail becomes requisite at every step. Without these constant acts of mutual kindness and assistance the course of business and commerce would be prodigiously impeded and disturbed. It becomes, then, excessively important to have the rule established that a surety is never to be implicated beyond his engagement.

Believing, as we do, that the engagement of the surety in this

case must be measured by the terms of the appointment under which the cashier was serving at the date of the bond, we are constrained to hold that the appellants can not be made liable for defalcations of Seidensticker occurring after his first re-election. * * *

For the reasons stated the judgment of the district court is reversed.

Note: Sureties on the bond of a treasurer who by law is to be chosen annually and hold his office until another is chosen and qualified in his stead are bound only for the year he is chosen and a reasonable time thereafter within which time his successor should have been elected and qualified. Chelmsford Co. v. Demarest, 7 Gray (Mass.) 1; Welch v. Seymour, 28 Conn. 387; Mutual Loan and Bldg. Assn. v. Price, 16 Fla. 204, 26 Am. Rep. 703.

Contra: Long v. Seay, 72 Mo. 648.

For other cases on the question of duration of liability on bonds of officers, see Oswald v. Mayor of Berwick, 5 H. L. Cases 856; Coombs v. Harford, 99 Maine 426, 59 Atl. 529; Middlesex Mfg. Co. v. Lawrence, 83 Mass. 339.

AMERICAN BONDING AND TRUST CO. *v.* MILWAUKEE HARVESTER CO.

91 *Md.* 733, 48 *Atl.* 72 (1900).

Boyd, J., delivered the opinion of the court.

The appellee sued the appellant on a surety bond for losses sustained by the former through Upton S. Brumbaugh in connection with the duties of his position as its general agent. There are two counts in the declaration, but they are similar, excepting as to the dates, the appellant having renewed for a year a bond which it had given for the previous year to "make good and reimburse to" the appellee to the extent of two thousand dollars, such pecuniary loss as it may sustain "by reason of any fraudulent or dishonest acts of the employed in connection with the duties of said position, amounting to embezzlement or larceny."

* * * * * * *

The next point to be considered is the alleged error in not sustaining the demurrer to the plaintiff's replication of the defendant's third plea. That plea alleges that all the moneys collected by Brumbaugh, during the term of the bond and the renewal thereof were paid over to the plaintiff and hence there was no pecuniary loss to it during the term of the bond sued upon. It sets out a list of accounts showing the names of parties from whom they were collected, the dates and amounts of collections, being in the aggregate $3,814.85, and alleges that each and every item of them was paid over. The plaintiff by the replication "denies that the sums of money included in the claim of $2,814.85, as itemized in said plea, were paid over to the Milwaukee Harvester Co., on the accounts for

which it is alleged in said plea they were collected, and hence denies the statement in said plea that there was no pecuniary loss to the plaintiff during the term of said bond, and plaintiff further alleges that there was an actual deficit of $2,814.85 in the accounts of said Brumbaugh during the terms of said bond." * * * The discussion of this point must therefore be narrowed to the inquiry whether the fact that the money collected by the agent was paid to the plaintiff, although on accounts other than those so collected relieved the agent of embezzlement and the defendant of liability, and, giving the plea the greatest possible latitude, we are not called upon to discuss the many technical defenses that may be interposed on the charge of embezzlement. * * *

Independent of authority we can not understand how the position of the appellant can be successfully maintained. If Brumbaugh had fraudulently converted this money to his own use by paying it to some creditor other than the plaintiff, there could be no question as to the responsibility of the bonding company, and upon what principle can it be relieved merely because he so used it in payment of other debts he owed the plaintiff? If the bonding company had given the appellee one bond to be in effect from December 1, 1895, to December 1, 1896, and another from the latter date to December 1, 1897, and Brumbaugh had collected from A and B $1,000 during the first year, which he appropriated to his own use, and during the second year collected from C and D a thousand dollars which he paid to the Harvester Company to be credited on the accounts of the first year, and that company did so credit A and B without any knowledge that the sums were collected from C and D and there was still a deficit of a thousand dollars at the end of the second year, a suit on the first bond would have been met by the defense that Brumbaugh's obligations were canceled by the payment so made, and the books of the appellee would have tended to sustain that defense. Then if suit was brought on the second bond, according to the appellant's theory it could defeat that action because the money received by the agent during that year had in fact been paid over to the plaintiff. Bonds of this character would be worse than useless if such results could follow, as the party undertaking to be indemnified by them might be misled and subjected to loss by relying on what he believed to be security, but which would prove to be a snare and delusion. Or take another instance, suppose the agent collected one hundred dollars from each of four parties and paid to his principal two hundred dollars to be credited on the accounts of A and B, but kept the balance, and the bonding company was sued for the amounts he received from C and D, could it be possible that it would be a defense to say that the money paid on account of A and B was actually received from C and D, and that having been paid to the principal he could not recover, or if the agent was indicted for embezzlement of the money received from

C and D would it avail him to prove that that particular money was paid over to the principal, although it was paid on account of what the agent had received from A and B? If that be true, then if a bank officer appropriates one hundred dollars to himself one week and replaces that with another hundred dollars, so appropriated, the next week, and continues that operation from time to time until he finally owes the last hundred dollars, which he does not pay, he could not be convicted of embezzlement, or a bonding company could not be held liable on a bond of this character for the last hundred dollars, because the agent had paid that money over to his principal, although he had appropriated the last sum to pay what he previously owed. If Brumbaugh had been the agent of the Harvester Company for Maryland and Virginia, and the appellant had been his surety for collections in Maryland alone, and another company for those in Virginia, and he had collected $2,800 in Maryland which he converted to his own use, and afterward collected $2,800 in Virginia, which he paid to his principal to be credited on account of the Maryland collections, would the appellant admit that it was still liable because the money paid was in reality collected from the Virginia debtors? Or could the other company be excused because that money (even if he paid the identical notes received by him) was actually received by the principal, although without knowledge of the source it came from, and was credited by the direction of the agent to the Maryland claims? Other illustrations might be given to show not only how useless securities of this character would be, but the results that might follow, if such a doctrine as is contended for be adopted. It might as well be said that if A owes B five dollars and he surreptitiously takes that amount out of the safe of B and then pays B the debt with it, that it would not be larceny, for he could with equal propriety say he had not appropriated it to his own use, but had taken it simply to pay B, although he was thereby cancelling a debt he owed him. As the point is now presented to us, the agent used his principal's money received during the term and under the conditions of the bond and applied it to his own use—that is, to the payment of debts he owed the principal, on account of collections previously made by him for which he was liable, and it was therefore as much a conversion of the principal's money as if he had paid it to some third party. He could not successfully defend himself from the charge of embezzlement by reason of such payment nor can his security do so under the terms of this bond. There is no allegation that the Harvester Company was in any wise responsible for, or knew of, the use of money, which the appellant was liable for under the bond, by Brumbaugh to pay other debts he owed it. If it had been accepted with such knowledge, another question would have arisen.

If, then, we were without authorities on the subject we would have no difficulty in reaching the conclusion that the defense in-

tended to be relied on under this plea is not well taken, but those reflecting on the question are not wanting. In Frownfelter v. State, use County Commissioners, 66 Md. 80, the suit was on a tax collector's bond. The collector had applied part of the money which he had collected, for the year for which the bond was liable, to his defalcations for previous years, and the sureties contended that that could not be done and they still be liable. This court said, on page 87: "If the commissioners or the treasurer knew that the money was applied to the taxes due for previous years had been collected on the levy of 1881, certainly they would have had no right to permit such application. But in the absence of any knowledge of the sources from which it was obtained, it is difficult to see how they could have prevented Myers from applying it to his indebtedness for any year which he might name. When the money was in his possession there was nothing to identify it or to distinguish it from other funds under his control, or rightfully belonging to him. The obligation assumed by his sureties was that he should pay the money in discharge of the tax levied, within the time required by law. If he paid it in discharge of previous taxes, it was as much a breach of his bond as if he had retained it in his own pocket. We think the law on this point is correctly stated in Inhabitants v. Bell, 9 Metcalf 499, and in Gwynne v. Burnell, 7 Clark and Finley 572." In the case last cited there were several opinions filed to the same effect, but Baron Gurney thus tersely stated his conclusion: "The application of any part of the money collected under the assessments of that year, to cover any deficiency in any former year, is just as much a breach of his duty and a forfeiture of his bond as if he had paid the money to any other creditors or lost it at the gaming table." To the same effect are State v. Sooy, 39 N. J. L. 539; Com. v. Knettle, 182 Pa. 176; County of Pine v. Willard, 39 Minn. 125; Crawn v. Seymour, 15 Wend. 19; Hecox v. Citizens' Ins. Co., 2 Fed. 535; State v. Smith, 26 Mo. 226. Those cases in no wise conflict with the general principles applicable to sureties, such as that they are only liable for defaults, etc., during the time the bonds are in force, but they hold that default is made by the application of money collected under the terms of the bond to the payment of other debts, even if such debts are due the obligee of the bond, provided, of course, he is not a party to its misappropriations and has no knowledge of it.

That the agent will be guilty of embezzlement by the misappropriation of funds under these circumstances, if the evidence shows sufficient fraudulent conduct on his part as to amount to that crime, was expressly decided in Rex v. Hall, Russ. and Ryan 463. There a clerk who had received eighteen pounds in one-pound notes for his employer charged himself with twelve of them and the same day received other money and paid over that sum and the other six pounds to his employer on account of another debt due by him to

the master. He was held to be guilty of embezzlement. See also State v. Baumhager, 28 Minn. 226; 2 Bishop New Crim. Law, § 377 (ed. of 1892); Roscoe's Criminal Evidence (456).

So if we give this replication the construction placed upon it by the appellant, it was an answer to the plea and the demurrer was properly overruled. No other questions having been urged before us, the judgment will be affirmed.

Judgment affirmed, appellant to pay the costs.

Accord: People v. Hammond, 109 Cal. 384, 42 Pac. 36; Inhabitants of Egremont v. Benjamin, 125 Mass. 15.

Contra: State v. Atherton, 40 Mo. 209.

Where a treasurer holds his office for several consecutive terms, and is found to be a defaulter at the end of his last term, it will be presumed, in the absence of proof to the contrary, that the entire default originated and occurred within his last term. Kelly v. State, 27 Ohio St. 567; County of Pine v. Willard, 39 Minn. 125, 39 N. W. 71, 1 L. R. A. 118, 12 Am. St. 622; Hetten v. Lane, 43 Tex. 279.

SECTION 9. SURETYSHIP BY OPERATION OF LAW

LAURA RAWSON *v.* NEWTON W. TAYLOR AND JACOB FINGER

30 *Ohio St.* 389, 27 *Am. Rep.* 464 (1876).

The present plaintiff was plaintiff in the common pleas, where she brought an action against Newton W. Taylor, Edward Griswold, and Jacob Finger, late partners, under the firm name of Taylor, Griswold & Co., on a promissory note, a copy of which, with indorsements, is as follows:

"$805.11. CLEVELAND, OHIO, November 17, 1865.

"One year after date we promise to pay to the order of Mrs. Laura Rawson, eight hundred and five and eleven one-hundredths dollars, at our office. Value received. TAYLOR, GRISWOLD & CO."

(45 cts. U. S. Rev. Stamp.)

Indorsed as follows:

"Paid interest on this note for one year to Nov. 17th, '66, $64.40. Nov. 15th, '67.

"Paid interest on the within for one year to Nov. 17th, '67, $80.50. Nov. 15th, '67.

"Paid on the within note, $10. Nov. 24th, 1868."

The petition seeks to recover a judgment against each of the defendants, on their partnership liability, on said note.

Taylor and Finger answer separately, and in substance admit that they were partners at the date of said note (November 17, 1865); but that soon after (November 24, 1865) the firm was

dissolved and a new firm was formed, of which they were not members, called E. R. Griswold & Co., consisting of said Edward Griswold, and C. H. Roberts and William Ferguson.

This new firm took the stock of goods on hand, and assumed to pay the debts of the old firm of Taylor, Griswold & Co., and save the retiring partners harmless.

1. It is claimed that the plaintiff had notice of this arrangement, which by its terms, as between themselves, constituted Taylor and Finger sureties of their former partner, and as such, after such notice, entitled to all the rights and privileges of sureties, as against the plaintiff.

2. Again: It was claimed in the answer, as a corollary from that proposition, that, after such notice, she gave time to the new firm by receiving interest to a day beyond its payment.

JOHNSON, J.: The note sued on was the joint liability of all the partners in the firm of Taylor, Griswold & Co.

Taylor and Finger, as well as Griswold, were principal debtors.

When the note was executed and delivered to Mr. Rawson, for a valuable consideration, the liability thereon of each partner became fixed. Their relations to that contract, and their liabilities thereon, could by no act between themselves be changed.

After this note was given, two of the partners, Taylor and Finger, retired from the firm, and a new one was formed, including Griswold, their former partner, which obligated itself to the retiring partners to pay all debts, and save them harmless.

Of this arrangement, it is claimed that Mrs. Rawson had notice. The evidence tends to show constructive notice to her of the formation of the new partnership to succeed Taylor, Griswold & Co., and subsequent dealings by her with the new firm. Whether she ever in fact knew of this arrangement, by which the new firm was to pay the debts of the old, does not appear, but, conceding that she did, the question presented by the charge of the court is, as to the effect of such knowledge on her rights on the note.

The charge was: "If she did have notice, then she was, after that knowledge, bound to treat them as sureties, and they were entitled to all the protection that sureties would be entitled to, as if the names of Taylor and Finger had been attached as sureties when the note was executed."

It is not claimed that Mrs. Rawson assented to this new arrangement, or by any valid contract, express or implied, agreed to modify or change the relations of these joint obligors to her upon the note, but simply, as between themselves, by the new arrangement, Taylor and Finger became sureties of their copartner, Griswold, of which fact Mrs. Rawson had notice. It is admitted that so long as she was not informed of this arrangement her rights and duties remained as fixed when the note was given; but it is claimed that when such

notice was given, then Taylor and Finger were entitled to the same rights and protection as if they had been originally sureties.

In substance, the charge of the court lays down the law to be, that the liability of principals on an obligation may be converted into a liability of suretyship by the acts of the obligors, without the assent of the obligee, by giving notice of such new arrangement.

In Thurston & Hays v. Ludwig, 6 Ohio St. 1, it was held that in order to change or vary the terms of a written contract, there must be a new contract to that effect between the parties, based on some new consideration, or such new contract must have been so far executed or acted upon that a refusal to carry it out would operate as a fraud.

Such is the general rule governing all contracts. In its application to cases like the one at bar, Story says: "It frequently happens that upon the retirement of one partner, the remaining partners undertake to pay the debts and to secure the credits of the firm. This is a mere matter of private arrangement and agreement between the partners, and can in no respect be admitted to vary the rights of existing creditors of the firm." Story on Partnership.

If the creditor assents to such arrangement after it becomes known to him, "and by his subsequent act or conduct, or binding contract, he agrees to consider the remaining partners as his exclusive debtors, he may lose all right and claim against the retiring partner."

The precise question at bar was considered at great length in Maingay v. Lewis, Irish R. Com. Law 495 (1869).

To an action on the money counts, the defendant pleaded that the cause of action accrued against him and one W. and one S. as partners; that afterward the firm was dissolved by a memorandum, of which plaintiff had due notice, by which W. agreed to pay all debts of the firm and indemnify his copartners from all claims, by which he became a surety only, of which plaintiff had notice, and after such notice took a bill of exchange at three months from W. alone for the amount, and thereby gave time to W., whereby defendant was discharged from liability. It was held that this plea was bad, and did not constitute a defense either at law or in equity, Whiteside, C. J., saying: "It is clear that no arrangement among joint debtors could prejudice the rights of their creditors." Again: "Another averment is that the plaintiffs 'had notice of this arrangement.' Well, I do not see how the men giving notice to the plaintiff of an arrangement by which they can not be affected, is to prejudice their rights."

In that opinion the distinction is clearly drawn between a case where the relation of principal and surety existed inter se at the time the obligation was entered into, of which the creditor had knowledge, and a case of joint principals inter se at the date of the obligation, and a subsequent agreement between the joint debtors, by which,

as between themselves, one becomes a surety of the other, of which subsequent arrangement the creditor had knowledge.

It is of the first importance to keep in mind the distinction, as it furnishes the key to harmonize many apparently conflicting decisions. In the former class of cases, the relation of suretyship exists at the very inception of the contract. The obligee having knowledge of that relation before he accepts the contract, takes it subject to all the rights and equities of such sureties inter se not inconsistent with the terms of the contract.

On the other hand, where the obligors are in fact joint debtors, he accepts them as such, and no subsequent arrangement between the joint debtors alone can change that relation. Bedford v. Deakin, 2 B. & Ald. 210; Evans v. Drummond, 4 Esp. 89; Pooley v. Harradine, 7 E. & B. 431; Butler et al. v. Berkey, 13 Ohio St. 523; Parsons on Part., 421-425, ch. 13; Manley v. Boycott, 75 E. C. L. 45.

We may concede that such an agreement between remaining and retiring partners, with notice to a partnership creditor, would impose upon him the duty of acting in good faith and with reasonable diligence in the management of securities placed in his hands for the payment of his claim, in the preservation of liens, and in the application of payments made.

A failure by the creditor, after such notice, to perform these duties, resulting in damages to the retiring partner, might well be regarded in a court of equity as cause to release him.

In such case the terms of the contract have not been changed, but the fact that new relations had arisen between the partners, by which one assumes, as between them, the burdens of all, might well call upon the creditor to act in such way as not to injure the retiring partners. Eq. Lead. Cases, pt. 11, p. 1902.

In such cases it has been held that if the creditor should give up securities in his hands and take those of the new firm, or give long credit for additional interest or new security, or release a levy made, without the consent of the retiring partner, then in all such cases the retiring partner will be discharged. Story on Part., § 158 et seq.; Parsons on Part., 421 et seq.; Colyer on Part., 554-570; Harris v. Lindsay, 4 Wash. C. C. 271; Bedford v. Deakin, 2 Barn. & Ald. 210.

An examination of the cases in support of the doctrine of the text-books fails to support the charge of the court below. Upon both reason and authority, therefore, we conclude that as Mrs. Rawson was not a party to this new contract between the partners, by which the new firm assumed the debts of the old, and had never assented thereto or agreed to be bound thereby, her rights on the promissory note, to regard all as principals, have not been altered or impaired.

These principles are aptly illustrated by the case before us.

Judgment of common pleas reversed and cause remanded.

Accord: McAreavy v. Magirl, 123 Iowa 605, 99 N. W. 193; A. F. Shapleigh Hdwe. Co. v. Wells, 90 Tex. 110, 37 S. W. 411, 59 Am. St. 783; Grotte v. Weil, 62 Nebr. 478, 87 N. W. 173; Norman v. Jackson Fertilizer Co., 79 Miss. 747, 31 So. 419; Barnes v. Boyers, 34 W. Va. 303, 12 S. E. 708; First Nat'l Bank v. Cheney, 114 Ala. 536, 21 So. 1002; Swire v. Redman, L. R. 1 Q. B. Div. 536.

Contra: Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Williams v. Boyd, 75 Ind. 286; Smith v. Sheldon, 35 Mich. 42, 24 Am. Rep. 529; Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056, 4 L. R. A. (N. S.) 666, 110 Am. St. 946.

DENISON UNIVERSITY *v.* MARY E. MANNING AND WM. H. MANNING

65 *Ohio St.* 138, 61 *N. E.* 706 (1901).

The Denison University commenced its action against Mary E. Manning and Wm. H. Manning in the common pleas of Montgomery to recover the balance due upon a note executed in favor of the university, of which the following is a copy, viz.:

"$6,000.00. DAYTON, OHIO, April 30, 1887.

"Three years after date, we, or either of us, promise to pay to the order of Denison University, of Granville, Ohio, six thousand dollars, for value received, with 7 per cent. interest per annum, payable semi-annually, on the 30th day of October and April of each year, and any instalment of interest not paid when due to bear 7 per cent. interest per annum until paid. Payable at Dayton, Ohio.

"MARY E. MANNING,
"W. H. MANNING."

Divers indorsements of interest paid on the note were set out in the petition, all of which were made either on the day interest was due, or after, save one. That indorsement is as follows: "April 15, 1891, paid six months' interest to April 30, 1891, $210.00." There was also an indorsement of $5,093.54, paid generally on the note. The balance claimed was $906.46, with interest from April 7, 1895, at seven per cent.

To this petition a second amended answer, admitting the making of the note, but setting up three defenses, was filed, which will be found stated in substance in the opinion. To this pleading a demurrer was interposed, which being overruled, a reply was filed and the cause proceeded to trial to a jury. At the conclusion of the evidence offered by defendants the plaintiff moved for judgment, which was overruled. Evidence was then given by plaintiff and the cause submitted. A verdict for defendants being rendered by the jury, and motion for new trial overruled, judgment was entered on the verdict. This judgment was affirmed by the circuit court. The plaintiff brings error.

Spear, J.: Two questions arise upon the record. One relates to the sufficiency of the answer; the other to the legal effect of the evidence of defendants introduced at the trial.

The answer sets up that after the giving of the note and mortgage declared upon, to wit, July 7, 1887, the defendants, Mary E. and W. H. Manning, sold the real estate described in the mortgage to one Babbitt, who bought for himself and others, who as part of the consideration for the conveyance, assumed and agreed to pay to plaintiff the mortgage note sued on; that the agreement was in writing and incorporated in the deed to Babbitt; that the plaintiff was duly advised of said sale and arrangement and the agreement of the purchaser to pay the note and consented thereto, and received the interest (pursuant to the terms of said agreement) on said note from Babbitt and assigns from April 30, 1887, to April 30, 1894; that subsequent to July 7, 1887, the land was sold by Babbitt to one George A. Slaght, and by him afterward sold to his sister, Emma K. Slaght; that the note became due April 30, 1890, and that the payment of the same was extended by plaintiff at maturity, and every six months thereafter, to April 30, 1894, by an agreement with plaintiff and said purchasers without the knowledge or consent of these defendants, for a valuable consideration, to wit: Upon the agreement that they should pay seven per cent. interest semi-annually for and during each six months; that the purchasers paid said interest as above set forth and agreed upon; that payments of interest were made in advance of various sums without the knowledge or consent of these defendants, which interest was so paid in full from April 30, 1890, up to April 30, 1894; that after the sale of the real estate as above described these defendants occupied the position of sureties on said note, and by reason of the extending of time of payment and so receiving the interest thereon, without their knowledge and consent, these defendants are released.

The demurrer to this answer raised the question of its sufficiency in law to constitute a defense. The first proposition is that the sale and conveyance of the mortgaged land by the Mannings to Babbitt, his assumption as a part of the purchase-price to pay the note of the Mannings to the university, and the knowledge by the university of that arrangement and its consent thereto, and accepting the payment of interest from the purchasers, changed the relation of the Mannings to the note from that of principal makers to that of sureties only. In other words, if a principal maker of a note and mortgage given to secure its payment, can effect the sale of the mortgaged lands, and obtain an agreement by the purchaser to pay the mortgage debt, and the mortgagee being apprised of the transaction, consents to it, and allows the purchaser to make payments on the note, he thereby releases the original maker as principal and may treat him thenceforth as a surety only. The proposition is not that the mortgagee agreed to release the original debtor, or to accept the

purchaser as such original debtor; no such averment appears; it is plainly and baldly that the effect in law of the consent of the mortgagee that the purchaser may pay, and allowing him to do so, ipso facto works a change in the relation of the principal maker to the note. Expressions here and there in text-books seem to countenance this conclusion, and there are decisions of courts to like effect. But is it sound? That, as between the mortgagor and the purchaser, the general relation of surety and principal may be created by reason of their contract, can be conceded, but this falls very far short of changing the relation of a mortgagor from a principal to a surety as respects the mortgagee. The mortgagor has received the full consideration and has executed his solemn promise in writing to pay the obligation unconditionally. The sale of the mortgaged property is made between the parties to it solely for their advantage, and in no sense for the benefit of the mortgagee. He need not know, and ordinarily does not know, anything about the transaction until after it is completed. If he happens to know that the negotiation is in progress, it is not within his power to arrest it, nor has he any voice in shaping it. He is as absolutely helpless to prevent it as is a total stranger. Incidentally it may work to his advantage. That is, being an agreement with the original payor to pay the debt the creditor may, if he so elect, take advantage of it. Emmitt v. Brophy, 42 Ohio St. 82. But the agreement is not made for his benefit; as before stated, it is wholly for the benefit of the parties to it. Nor could they compel the mortgagee to recognize the sale or look to the purchaser for the payment of the debt. We are aware that the authorities are not in accord on the proposition. Among the cases favoring the contention of defendants in error is Murray v. Marshall, 94 N. Y. 611, and there are others. On the other hand, Teeters v. Lamborn, 43 Ohio St. 144; Boardman v. Larrabee, 51 Conn. 39, and James v. Day, 37 Iowa 164, hold to the opposite view. Other decisions of like import are found in the reports, and the weight of authority seems to support the contention of plaintiff in this respect.

This being the situation, why should the mortgagor be accorded the right to compel the mortgagee to elect between a repudiation of the obligation thus assumed by the purchaser and a novation by which he releases the original debtor from his obligation as principal, and consents that from thenceforth he shall be regarded as surety only? Why should the creditor be compelled to trade debtors or release any security he already holds? Whether the obligation is paid by the maker or by one to whom he has transferred the property forming the security is a matter of indifference to the payee; for that purpose one hand is as good as another. We are of opinion that the proposition is not sound; that the facts stated do not show that the Mannings became sureties as between them and the university. Hence, the further proposition that the Mannings are

released because of the alleged agreement to extend the time for payment of the principal, by reason of a promise to pay seven per cent. interest without their consent, is without support in law.

Judgment reversed.

Accord: Shepherd v. May, 115 U. S. 505, 29 L. ed. 456; Mulvane v. Sedgley, 63 Kans. 105, 64 Pac. 1038, 55 L. R. A. 552; Webster v. Fleming, 178 Ill. 140, 52 N. E. 975; Martin v. Humphrey, 58 Nebr., 414, 78 N. W. 715; Boardman v. Larrabee, 51 Conn. 39.

Contra: Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139; Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130; George v. Andrews, 60 Md. 26, 45 Am. Rep. 706; Union Mut. Life Ins. Co. v. Hanford, 143 U. S. 187, 36 L. ed. 118; Terry v. Groves, 258 Mo. 450, 167 S. W. 563.

SECTION 10. THE DOCTRINE OF ESTOPPEL AS APPLIED TO CONTRACTS OF SURETYSHIP

HOFFMAN, ADMX., ET AL. *v.* FLEMING

66 *Ohio St.* 143, 64 *N. E.* 63 (1902).

Davis, J.: This is an action by a legatee under the will against the executor and his sureties, on the executor's bond. The recital of the bond, which is in due form, is that Ripley C. Hoffman has been appointed, by the probate court of Franklin county, Ohio, executor of the last will and testament of Margaret H. Fleming. One of the conditions of the bond is that "said Ripley C. Hoffman, as executor as aforesaid, shall administer according to law and the will of the testator" all her goods, chattels, rights and credits, etc. Thus the facts that Margaret H. Fleming died leaving a will and that Ripley C. Hoffman, the principal in the bond, was the executor of that will, are formally stated and made the basis of the contract. As was said by this court long ago, "In cases where the condition of a deed has reference to any particular thing, the obligor shall be estopped to say there is no such thing." For example, if a condition be that a man and his wife shall do an act, the man will be estopped to say he has no wife; or if the condition be to perform the covenants of an indenture, the obligor is estopped to say there is no indenture. Douglass v. Scott, 5 Ohio 194, 198; Herman on Estoppel, §§ 634, 636. The obligors can not be allowed to blow hot and cold; in one breath obtaining control of the estate by vouching for the official character of the principal, recognizing the will under which he was appointed and holding themselves bound for due administration according to law and the will, and in the next breath denying the will and fiduciary relation of the principal and maladministering the property of legatees with impunity. It does not lie in their mouths to say that there was no legal validity in the acts

by which they obtained the possession of the property. Their bond, given under the order of, and approved by, the court, gave color to the executorship of Hoffman, and after the estate has been administered by him for years, under the orders of the court appointing him, and in accordance with the will, until a deficit occurs, it is too late for the obligors on the executor's bond to say that the court had no jurisdiction to probate the will or to appoint the executor; that there is no will and that there never was an executor. Kelly v. State, 25 Ohio St. 567, 577, 578.

Nevertheless, the counsel for the plaintiff in error strenuously and ably argue that the sureties may show that the appointment of the executor was without jurisdiction, unauthorized by law and void, and that they may thus be discharged from liability on their bond. It is not to be denied that this position has some support among reported cases, notably in Mississippi and Georgia; but it seems to us that the weight of authority is distinctly and overwhelmingly against it. Indeed, if the doctrine of estoppel may be applied to sureties on an administration bond, or a guardian's bond, so that by its recitals they may not be allowed to deny that their principal has been duly appointed (Bigelow on Estoppel, 373; Herman on Estoppel, § 634), it is difficult to perceive how a want of jurisdiction in the appointing court could alter the rule. The effect of the recitals is just the same, and it would be just as inequitable not to estop the obligors in the case where the appointment was made without jurisdiction, and assets obtained thereby, as in a case where it was made irregularly by a wrongful exercise of jurisdiction. Accordingly it was said in New York that "the execution of the bond precludes both principals and sureties from gainsaying the surrogate's jurisdiction in any proceedings for the assets which the appointment and bond enabled the principal to receive." People v. Falconer, 2 Sandf. 81, 83; (superior court) approved in Johnston v. Smith, 25 Hun (N. Y.) 171. In Harbaugh v. Albertson, 102 Ind. 69, when in replevin proceedings before a justice of the peace, a surety on the replevin bond by his execution thereof enabled the plaintiffs in the replevin to obtain the possession of the property in controversy, it was held that "the surety should be estopped from setting up as a defense to an action on the bond, that the justice before whom the action was commenced had no jurisdiction over the persons of the parties."

In Iredell v. Barbee, 9 Iredell (N. C.) 250, it was held that where a court has no power to appoint a guardian, but does appoint one, and he gives bond with sureties and takes possession of the estate of the ward, it is not competent for any of the obligors in such bond to object to its validity on the ground of want of power in the court to make the appointment.

It was held in Arkansas, Norton v. Miller, 25 Ark. 108, that it is irregular and erroneous for the probate court of one county to

appoint a guardian for minors who reside with their property in another county; and that both the principal and the sureties on the guardian's bond are estopped from denying the truth of the recitals in the bond that the principal was appointed and that they will not be permitted to deny the jurisdiction of the court making the appointment.

In Cutler v. Dickinson, 8 Pick. 386, it appeared on examining the records of the probate office that there was no decree, nor any other evidence of the appointment of the administrator; yet in a suit on the bond of the administrator it was held that the obligors were estopped to deny that the principal was appointed administrator.

The People v. Norton, 9 N. Y. 176, was a case in which a court having general jurisdiction of all cases of trust made an irregular and erroneous appointment of a trustee, no notice of the proceeding having been given to the cestuis que trust, and this was set up as a defense in an action on the trustee's bond. The court, per Ruggles, C. J., said that: "This is an objection which neither the trustee nor his surety can be allowed to make. Lynch (the trustee) got possession of the trust estate under the proceedings by color of which he claimed to be trustee, and Norton voluntarily undertook as his surety that he should faithfully administer the trust. If the proceeding was irregular for want of notice to the children of Mrs. Lynch, they might object to it in a proper manner for that cause; but Lynch, after having obtained the property upon the pretense of being the trustee, can not be permitted to deny his liability to account as such. The defendant who became his surety in order that he might take the trust property, is for a like reason precluded from denying his liability as surety." This case was cited with approval in Bassett v. Crafts, 129 Mass. 513, in which it was held that the sureties on a trustee's bond can not in an action against them on the bond, impeach the validity of the principal's appointment.

In Gray v. State, 78 Ind. 68, upon an extended review of authorities, it was held that the surety on a guardian's bond, executed to enable him to sell his ward's real estate, is estopped, after the sale and receipt of the money, to deny the appointment of the guardian. The same doctrine runs through the following cases: Fridge v. State, 3 Gill & Johnson (Md.) 103; People v. Huson, 78 Cal. 154; Middleton v. State, 120 Ind. 166; Williamson v. Woodman, 73 Maine 163; State v. Stark, 75 Mo. 566; Mayor v. Harrison, 30 N. J. L. 73.

In conclusion, it seems to me that the decision of this court in Shroyer v. Richmond, 16 Ohio St. 455, is decisive of this case, in more than one aspect of it. This was also an action upon a bond, the bond of a guardian. In that case also the general jurisdiction of the probate court was not attacked, but it was claimed that the appointment was made without authority of law; and in that case also it was claimed that the bond was invalid because the appoint-

ment itself was a nullity. On the trial, "to maintain the issues on their part, the defendants offered to prove to the jury, by parol testimony, that at the time of the appointment of Coblentz and Shroyer, respectively, as guardians of Long, he was neither a minor, a lunatic, insane person, an idiot, nor a deaf and dumb person, incapable of taking charge of his affairs; and that there was no testimony offered before the court, at the time of making of either of said appointments, to show that Long was a minor, lunatic, insane person, idiot, or deaf and dumb person, incapable of taking charge of his affairs; and that he was not brought before the court; and that there was no jury summoned by the court, nor inquest held by the jury, nor a jury sworn for that purpose, nor any testimony offered, before a jury or the judge, to show that he was a deaf and dumb person, incapable of taking charge of his affairs; nor any verdict of a jury finding him to be such a person." In other words, the defendants, the sureties on the bond, while conceding that the probate court was the proper tribunal to appoint guardians, just as in this case it is the proper tribunal for the probate of wills and the appointment of executors, yet claimed that the statutes in relation to the appointment of guardians had not been complied with, as it is claimed here. Yet in that case the court held, as already noted in this opinion, that "an order made by a probate court, in the exercise of jurisdiction, can not be collaterally impeached. The record showing nothing to the contrary, it will be conclusively presumed, in all collateral proceedings, that such order was made upon full proof of all the facts necessary to authorize it." It will be noted that the language of the court is "in the exercise of jurisdiction," not in the proper exercise of jurisdiction. It was further held that "in a suit on a guardian's bond, containing a recital of the appointment of such guardian by the proper authority, the obligors are estopped to deny the fact thus recited, or to question the validity of the appointment." The phrase "the proper authority" in the syllabus was evidently not intended to limit application of the rule as to estoppel, but was used rather with reference to the facts of the case; for Scott, J., in the opinion says: "This bond recites the appointment of Coblentz, by the proper authority, as guardian of Long. By executing this bond they obtained for their principal the possession and control of his ward's property, and can not now be permitted to escape liability to account therefor by denying the recitals of their own bond. They are estopped to do so." Evidently it was in the mind of the court that the obtaining of possession of assets through the medium of a court which had general jurisdiction over the subject-matter, although it may have been improperly, or even unlawfully, exercised, gave color to the alleged appointment of the guardian and aided in the perpetration of a wrong which should be prevented by estoppel. And that in our opinion is precisely the situation in this case.

See also State v. Piatt, 15 Ohio 15, in which it was held that

where a clerk of the court of common pleas had been appointed, had given bond and had entered upon the duties of his office, neither he nor his sureties could show that he had failed to qualify by taking the oath of office; and that they will not be permitted to defend themselves upon the ground that he was a mere usurper.

Our conclusion is that, both upon reason and authority, the plaintiffs in error should be estopped from questioning the rights of the defendant in error under the will, and from disputing the validity of the appointment of Hoffman as executor, and from denying their liability as sureties on the executor's bond. The judgment of the circuit court, reversing the judgment of the court of common pleas is affirmed.

Burket, Shauck and Price, JJ., concur.

Accord: Shaw v. Havekluft, 21 Ill. 128; Monteith v. Commonwealth, 15 Grat. (Va.) 172; Hauenstein v. Gillespie, 73 Miss. 742, 19 So. 673, 55 Am. St. 569; Hine v. Morse, 218 U. S. 493, 21 Ann. Cas. 782.

See also Washington Ice Co. v. Webster, 125 U. S. 426, 31 L. ed. 799; Hundley v. Filbert, 73 Mo. 34; Harris v. State, 60 Ark. 212, 29 S. W. 751.

Where the bond recites that an appeal has been perfected the sureties are estopped to deny it (Meserve v. Clark, 115 Ill. 580, 4 N. E. 770), even though an appeal in such case was prohibited by law. (Gudtner v. Kilpatrick, 14 Nebr. 347, 15 N. W. 708.)

A surety is estopped to deny the existence of a contract recited in the bond (Hayden v. Cook, 34 Nebr. 670, 52 N. W. 165; Price v. Scott, 13 Wash. 574, 43 Pac. 634), but if the contract, the existence of which is admitted in the bond, has been obtained by fraud, the sureties are not estopped to deny its validity after the principal has repudiated it (Hazard v. Irwin, 18 Pick. (Mass.) 95; Henry v. Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. 580).

SECTION 11. CONSTRUCTION OF THE CONTRACT

MASON *v.* PRITCHARD

12 *East* 227 (1810).

The defendant engaged in writing to guaranty the plaintiff "for any goods he hath or may supply my brother W. P. with to the amount of £100," and declared in assumpsit as upon a contract by the defendant to guaranty goods to be at any time afterward delivered to his brother to that amount. It appeared at the trial before Wood, B., at Worcester, that at the time when the guaranty was given goods had been supplied to W. P. to the amount of £66, and another parcel was supplied afterward, amounting together to £124, all which had been paid for; and the sum now in dispute was for a further supply of goods to W. P. And the question was, whether this were a continuing contract for guarantying the supply of goods at any time afterward furnished as long as the parties continued to

deal together; or, whether it were confined to the first hundred pounds' worth of goods furnished? The learned judge held it to be a continuing contract to guaranty to the extent of £100 goods which might at any time be furnished to the brother, till notice to put an end to it; and the plaintiff recovered accordingly; but leave was given to move to enter a nonsuit if the court thought that this was not the true construction of the contract. Upon which Abbott now moved to enter a nonsuit; contending for the limited construction of the guaranty.

But all the court were of opinion with the plaintiff that this was a continuing or standing guaranty to the extent of £100, which might at any time become due for goods supplied until the credit was recalled. The words, they said, were to be taken as strongly against the party giving the guaranty as the sense of them would admit of; and the meaning was, that the defendant would be answerable at all events for goods supplied to his brother to the extent of £100 at any time, but that he would not be answerable for more than that sum. Rule refused.

Accord: Merle v. Wells, 2 Camp. 413; Mayer v. Isaac, 6 M. & W. 605.

LAWRENCE *v.* McCALMONT

2 *How. (U. S.)* 426, 11 *L. ed.* 326 (1844).

JUSTICE STORY: Some remarks have been made on the argument here upon the point in what manner letters of guaranty are to be construed; whether they are to receive a strict or a liberal interpretation. We have no difficulty whatsoever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation we do not mean that the words should be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purposes to which it is applied. We should never forget that letters of guaranty are commercial instruments—generally drawn up by merchants, in brief language—sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits so often sought in the present active business of commerce throughout the world. The remarks made by this court in the case of Bell v. Bruen (1 How. R. 169, 186) meet our entire approbation. The same doctrine was asserted in Mason v. Pritchard (12 East R. 227), where a guaranty was given for any goods he hath or may supply W. P. with, to the amount of £100; and it was held by the

court to be a continuing guaranty for goods supplied at any time to W. P. until the credit was recalled, although goods to more than £100 had been first supplied and paid for; and the court on that occasion distinctly stated that the words were to be taken as strongly against the guarantor, as the sense of them would admit of. The same doctrine was fully recognized in Haigh v. Brooks (10 Adol. & El. 309) and in Mayer v. Isaac (6 Mees. & Wels. 605), and especially expounded in the opinion of Mr. Baron Alderson. It was the very ground, in connection with the accompanying circumstances, upon which this court acted in Lee v. Dick (10 Peters 482) and in Mauran v. Bullus (16 Peters 528). Indeed, if the language used be ambiguous and admits of two fair interpretations, and the guarantee had advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury.

Accord: Drummond v. Prestman, 12 Wheat. (U. S.) 515, 6 L. ed. 712; Taussig v. Reid, 145 Ill. 488, 32 N. E. 918, 36 Am. St. 504; Hoey v. Jarman, 39 N. J. L. 523.

NATHANIEL RUSSELL *v.* JOHN I. CLARK'S EXECUTORS ET AL.

7 Cranch (U. S.) 69, *3 L. ed.* 271 (1812).

Appeal from the circuit court of the United States for the district of Rhode Island. Nathaniel Russell filed his bill alleging that Jonathan Russell, in behalf of Robert Murray & Co., drew on them certain bills of exchange, which the complainant indorsed for their accommodation, and had been obliged to pay. That he made those indorsements on the faith of the following letters from Clark & Nightingale:

"Providence, 20th January, 1796.

"Nathaniel Russell, Esq.:

"Dear Sir—Our friends, Messrs. Robert Murray & Co., merchants in New York, having determined to enter largely into the purchase of rice, and other articles of your produce in Charleston, but being entire strangers there, they have applied to us for letters of introduction to our friend. In consequence of which, we do ourselves the pleasure of introducing them to your correspondence as a house on whose integrity and punctuality the utmost dependence may be placed; they will write you the nature of their intentions, and you may be assured of their complying fully with any contract or engagements they may enter into with you. The friendship we

have for these gentlemen induces us to wish you will render them every service in your power; at the same time, we flatter ourselves the correspondence will prove a mutual benefit.

"We are, with sentiments of esteem,

"Dear sir,

"Your most obedient servants,

"CLARK & NIGHTINGALE."

"PROVIDENCE, 21st January, 1796.

"NATHANIEL RUSSELL, ESQ.:

"DEAR SIR—We wrote you yesterday a letter of recommendation in favor of Messrs. Robert Murray & Co. We have now to request that you will render them every assistance in your power. Also that you will, immediately on the receipt of this, vest the whole of what funds you have of ours in your hands in rice, on the best terms you can. If you are not in cash for the sales of the China and Nankins, perhaps you may be able to raise the money from the bank, until due; or purchase the rice upon a credit, till such time as you are to be in cash for them; the truth is, we expect rice will rise, and we want to improve the amount of what property we can muster in Charleston, vested in that article, at the current price; our Mr. Nightingale is now at Newport, where it is probable he will write you on the subject.

"We are, dear sir,

"Your most obedient servants,

"CLARK & NIGHTINGALE."

MARSHALL, C. J., delivered the following opinion:

This is a suit in chancery instituted for the purpose of obtaining from the defendants, payment of certain bills of exchange drawn by Jonathan Russell, an agent of Robert Murray & Co., and indorsed by Nathaniel Russell; which bills were protested for nonpayment, and have since been taken up by the indorser. The plaintiff contends that the house of Clark & Nightingale had rendered itself responsible for these bills by two letters addressed to him, one of the 20th and the other of the 21st of January, 1796, on the faith of which his indorsements, as he says, were made.

The law will subject a man, having no interest in the transaction, to pay the debt of another, only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction. It is the duty of the individual, who contracts with one man on the credit of another, not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume. In their letter of the 20th, Clark & Nightingale indicate no intention to take any responsibility on themselves, but say that Mr. Russell may be assured Robert Murray

& Co. will comply fully with their engagements. In their letter of the 21st they speak of the letter of the preceding day as a letter of recommendation, and add, "we have now to request that you will endeavor to render them every assistance in your power."

How far ought this request to have influenced the plaintiff? Ought he to have considered it as a request that he would advance credit or funds for Robert Murray & Co., on the responsibility of Clark & Nightingale, or simply as a strong manifestation of the friendship of Clark & Nightingale for Murray & Co. and of their solicitude that N. Russell should aid their operations as far as his own view of his interests would induce him to embark in the commercial transactions of a house of high character, possessing the particular good wishes of Clark & Nightingale?

It is certain that merchants are in the habit of recommending correspondents to each other without meaning to become sureties for the person recommended; and that, generally speaking, such acts are deemed advantageous to the person to whom the party is introduced, as well as to him who obtains the recommendation.

These letters are strong, but they contain no intimation of any intention of Clark & Nightingale to become answerable for Robert Murray & Co., and they are not destitute of expressions alluding to that reciprocity of benefit which results from the intercourse of merchants with each other. "The friendship," say they, in their letter of the 20th, "we have for these gentlemen, induces us to wish you will render them every service in your power, at the same time we flatter ourselves this correspondence will prove a mutual benefit."

Mr. Russell appears to have contemplated the transaction as one from which a fair advantage was to be derived. He received a commission on his indorsements.

The court can not consider these letters as constituting a contract by which Clark & Nightingale undertook to render themselves liable for the engagements of Robert Murray & Co. to Nathaniel Russell. Had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendants of the extent of his engagements.

Bill dismissed and cause remanded.

Accord: Miller v. Stewart, 9 Wheat. (U. S.) 680, 6 L. ed. 189; State v. Churchill, 48 Ark. 426, 3 S. W. 352, 880; Schoonover v. Osborne, 108 Iowa 453, 79 N. W. 263; Markland Mining &c. Co. v. Kimmel, 87 Ind. 560; State v. Medary, 17 Ohio 554; Morgan v. Boyer, 39 Ohio St. 324, 48 Am. Rep. 454; Tomlinson v. Simpson, 33 Minn. 443, 23 N. W. 864.

Where there is no ambiguity on the face of the instrument it is error to admit evidence of the circumstances surrounding its execution. McShane Co. v. Padian, 142 N. Y. 207, 36 N. E. 880.

YOUNG, APPELLANT, *v.* AMERICAN BONDING COMPANY OF BALTIMORE

228 *Pa.* 373, 77 *Atl.* 623 (1910).

Opinion by Mr. Justice Stewart.

A recital of the facts is necessary to an understanding of the questions involved. The action was against principal and surety in a bond of $25,000 conditioned on the completion of certain buildings and improvements within a stipulated time. The plaintiffs being the owners of certain real estate at Atlantic City contracted by written article of agreement dated February 26, 1906, to sell and convey the same to Norman Kellogg, one of the appellants. The agreement provided that the consideration should be a purchase-money mortgage for $500,000 to secure an issue of first-mortgage gold bonds of like amount bearing interest at the rate of six per cent., payable semi-annually, with a sinking fund provision of $10,000 yearly, the whole issue of bonds to be redeemable at any understood period after three years, and to become due and payable at the expiration of ten years, the mortgage to be held by the Land Title & Trust Company of Philadelphia as trustee for the bondholders. It was further stipulated that of the bonds $400,000 were to be forthwith issued to the vendors, and the remaining $100,000 were to be held by the trustee, to be paid over upon the order of Kellogg upon the completion by him or his assigns of certain buildings and improvements which he had covenanted to make on the purchased premises, as part of the consideration, at an actual cost of not less than $350,000. Another provision in the contract was that in case the vendees should organize a corporation for the purpose of improving the property and conveyed the title to such corporation, the corporation should at the request of the grantor execute its bonds to the amount of $500,000 to be secured by the purchase-money mortgage above provided for, thereby making them a first lien. Still another was that inasmuch as no cash consideration was being paid on the purchase, in order to indemnify the vendors against loss of rentals in case of failure of the vendee to make the improvements stipulated for within the required time, the latter should furnish a bond with security in the sum of $75,000 (afterward reduced to $25,000) to protect against such contingency. The contract was to take effect and become binding on the parties only upon the execution and delivery of this bond. In compliance with this stipulation the bond here sued on was furnished and accepted March 9, 1906. It recites the fact of agreement of sale and purchase, the consideration, and the reason and purpose in requiring the bond, followed by this condition: "Now therefore the condition of this obligation is such that if the said principals shall well and faithfully

construct and complete said improvements of the value of three hundred and fifty thousand dollars ($350,000) upon said property, as provided in said agreement, on or before the 31st day of December, 1906, then this obligation to be null and void; otherwise it shall remain in full force and effect." The obligors were Kellogg and two others who signed as principals, and the American Bonding Company as surety. Kellogg and the bonding company were the only parties served, and the case proceeded against them. The facts as developed on the trial showed entire failure on the part of Kellogg to make the improvements stipulated for, although a corporation organized by him to accomplish this undertaking had expended in the attempt before its abandonment upward of $60,000. A verdict was rendered for the plaintiffs, which upon a point reserved, affecting only the bonding company, was set aside as to the bonding company by the court, and judgment entered for the latter non obstante. This appeal is from the judgment so entered. Upon the admitted facts the learned trial judge held that, in the course of settlement between the plaintiffs and Kellogg, there had been such a departure from the terms of the original contract as relieved the surety. The variance was in connection with the purchase-money mortgage. Upon the acceptance by plaintiffs of the bond in suit, March 13, 1906, the transaction between plaintiffs and Kellogg was completed, the former executing and delivering their deed of conveyance, and the latter a purchase-money mortgage. This mortgage contained none of the special provisions set out in the contract. By its terms it was given to secure, not an issue of $500,000 of first mortgage bonds, with the incidents which according to the provisions of the contract were to attach to such bonds, but to secure one certain bond given by Kellogg in the sum of $500,000 payable to the plaintiffs' representative or his assigns on or before March 1, 1916, with interest payable semiannually. In neither bond nor mortgage is there any reference to the special provisions which were to govern, nor does either contain any reference to the rights of Kellogg. The learned trial judge held that this constituted a variance in substantial and material respects from what was required by the agreement, and operated to release the surety in the bond.

* * * * * * *

This brings us to the second contention of appellants, viz., that the settlement of March 13 involved no material departure from the contract of February 26, 1906. In all essential particulars the appellee here is an insurance company, and its obligation in this particular instance was that of an insurer. It was paid for its undertaking; the amount of its compensation being based on the calculation of risk assumed. The trend of all our modern decisions, federal and state, is to distinguish between individual and corporate suretyship where the latter is an undertaking for money considera-

tion by a company chartered for the conduct of such business. In the one case the rule of strictissimi juris prevails, as it always has; with respect to the other, because it is essentially an insurance against risk, underwritten for a money consideration by a corporation adopting such business for its own profit, the courts generally hold that such a company can be relieved from its obligation for suretyship only where a departure from the contract is shown to be a material variance. "The doctrine that a surety is a favorite of the law, and that a claim against him is strictissimi juris does not apply where the bond or undertaking is executed upon a consideration by a corporation organized to make such bonds or undertakings for profit. While such corporations may call themselves 'surety companies,' their business is in all essential particulars that of insurance. Their contracts are usually in the terms prescribed by themselves, and should be construed most strictly in favor of the obligee." 32 Cyc., p. 306, and the authorities there cited in support. Having regard to this particular contract before us, and interpreting it according to its own terms, we have said that it is essentially a contract of insurance. It follows that there is but one way by which it is to be determined whether the variance complained of was a material variance. The test is to be found in the answer to the question whether it substantially increased the chances of the loss insured against. If such were the result, it would have been fair reason for demanding a higher premium than was paid, and the materiality is thus made apparent. Hartman v. Insurance Co., 21 Pa. 466; Murphy v. Insurance Co., 205 Pa. 444. It is not a question whether the variance actually caused the breach of the bond; but whether it was such a variance as a reasonably careful and prudent person undertaking the risk would have regarded as substantially increasing the chances of loss. To this, as it seems to us, there can be but one answer. Under the contract $100,000 of bonds of a certain description were to be available to Kellogg on completion of the improvements. These bonds were to be secured by a mortgage on the property containing certain definite provisions as to their redemption; when issued they were to be on a parity with the bonds which the vendors were to receive, and were to rest on the same security. If the property conveyed had a value of $400,000—the amount the vendors were to receive—it is safe to assume that any considerable expenditure in improvements thereon as the work progressed would give to the bonds held in reserve for Kellogg, and which were to be issued only on completion of these improvements, a corresponding value as an asset which could, by way of anticipation, be made available in aiding him in the completion of the work by assignment or otherwise. Would such fact be likely to occur to any one in calculating the risk assumed in underwriting Kellogg's performance? If so, here was a material departure from the contract. The settlement as made contained no provision for Kellogg's bonds; indeed, it pre-

cluded the possibility of their issue at least on the basis originally provided. It gave the vendors one bond for $500,000, $100,000 in excess of the price stipulated for; it showed no interest in Kellogg in the security; but on the other hand increased his liability. To that extent it increased the hazard of his accomplishing what he had undertaken to do, and correspondingly increased the risk the appellee had underwritten. It is not an answer to this to say that it was but a temporary arrangement; that what was contemplated was that the improvements were to be made by a corporation to be issued by such corporation. True, the contract contemplated the contingency of Kellogg organizing a corporation to take over the property and make the required improvements; but the corporation was to acquire the property through a conveyance from Kellogg, and the bonds to be issued by it were to conform to the bonds previously provided for, that is to say, "to be a first lien upon all its property and assets, being further secured by the purchase-money mortgage already provided for." The essential fact is that the mortgage given by Kellogg was not the mortgage "already provided for," and could not be made to secure bonds with the incidents that were to attach under the original contract. That the settlement was a contemplated temporary expedient is nothing more than a suggestion; but if it were a fact established in the case, it rendered impracticable the original scheme. The third position advanced by appellants is, that whatever departure there was from the contract was with the knowledge and approval of the surety. It is not pretended that the surety was consulted as to the mortgage which was accepted, or had any knowledge as to its contents. It was acquainted with the fact that Kellogg had organized a corporation to make the improvements, but its knowledge extended no further. It had a right to assume that notwithstanding this arrangement the terms of the original contract would be observed, for it was so stipulated. The case was properly ruled by the learned trial judge.

The assignments of error in this appeal are overruled. The judgment is affirmed.

American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977.

Harlan, J.: If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers, or agents of the surety company. This is a well-established rule in the law of insurance. First National Bank v. Hartford F. Insurance Co., 95 U. S. 673; Western Ins. Co. v. Cropper, 32 Pa. 351, 355; Reynolds v. Commerce Fire Ins. Co., 47 N. Y. 597, 604; Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 666; Fowkes v. Manchester Life Assur. & Loan Assn., 3 Best & S. 917, 925. As said by Lord St. Leonards in Anderson v. Fitzgerald, 4 H. L. Cas. 483, 507, "It (a life policy) is of course prepared by the company, and if therefore there should be any ambiguity in it, must be taken, according to law, most strongly against the person who prepared it." There is no

sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which in the employer's service he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank.

SCHOOL DISTRICT NO. 1 OF CLARK COUNTY, APPELLEE, *v.* G. F. McCURLEY ET AL. (THE MASSACHUSETTS BONDING AND INSURANCE COMPANY), APPELLANTS

92 *Kans.* 53, 142 *Pac.* 1077, *Ann. Cas.* 1916B, 238 (1914).

The opinion of the court was delivered by Smith, J.

This action was brought by the school district to recover on the bond of the bonding company which insured the performance of the contract on the part of McCurley, the contractor, for the building of an addition to the schoolhouse of the appellee at Ashland.

After various motions and amendments to the pleadings were made and ruled upon, the case was tried in the district court to a jury, a motion for a new trial made and overruled, and a judgment rendered in favor of the school district and against the bonding company for $2,271.70. The bonding company appeals. Many assignments of error are made, but only four are urged in argument. In fact the appellant seems to argue all of these assignments of error together.

To save space we will refer to the contract between the school district and the contractor as the building contract, and to the bond given by the appellant as the insurance contract. It is urged that one of the provisions of the building contract was that the building should be completed by November 15, 1908. The bond provided that no liability should attach to the surety unless, in the event of any default on the part of the principal, the appellee should immediately, upon knowledge thereof and not later than thirty days after such default, deliver to the bonding company, at its office in Boston, written notice thereof.

It is conceded that the building contract was not completed November 15, 1908, and that no notice thereof was given to the bonding company within the time prescribed. On the part of the appellant it is claimed that this is a complete bar to the appellee's right of recovery. On the part of the appellee it is contended that no damage or loss is shown to have occurred to appellant by reason of the

failure to give the notice, and hence the failure to give notice thereof constitutes no defense whatever to the action.

On the trial the jury found that the building was fully completed February 20, 1909, about three months after the time specified in the contract.

The appellee, conceding the facts upon which the contention is made, alleges that the bonding company suffered nothing by reason of the failure of notice, and this is the principal question in the case —whether the notice was so far a condition precedent to the right of the school district to recover as to defeat its action, or whether, if it appears that the insurer was not injured by lack of notice, it is still liable to pay.

A marked distinction is recognized by many of the courts as to the application of the rule as between contracts of an accommodation surety and the contract of a paid surety. As to the contracts of an accommodation surety, made dependent upon a condition precedent, the courts all agree that the strict letter of the contract will be enforced; but as to the contract of a paid surety, many of the courts, especially in the latter decisions, inquire whether the surety was injured by the default of the condition, and if so, they enforce it only to the extent of the injury. In Hull v. Bonding Co., 86 Kans. 342, it was held that the rule that sureties are favorites of the law does not apply to corporations engaged in the business of furnishing bonds for profit.

In support of its contention the appellant cites Insurance Co. v. Thorp, 48 Kans. 239, in which it was held that the failure of an insured to give notice of the loss or damage by fire within sixty days after a loss has occurred, according to the contract, debarred the right of recovery. Also, Insurance Co. v. Russell, 65 Kans. 374, which held valid a stipulation in a fire insurance policy that the policy should become void if the premises should become vacant without the consent of the company indorsed on the policy. Also Insurance Co. v. Knerr, 72 Kans. 385, in which it was held that the failure to keep the books and invoices of the insured securely locked in a fire-proof safe, as provided in the policy, barred an action thereon. The reasons for these decisions, and others of like character, are obvious. In the Thorp case the failure to give the notice interfered with the right of the company to secure evidence of the character and extent of the loss. In the Russell case the vacancy presumably increased the hazard of loss and practically furnished a motive on the part of the insured to have a fire occur. The case of Fire Association v. Taylor, 76 Kans. 392, although containing an expression which seems pertinent here, is not so in fact. The question there was the interpretation of an ambiguous contract. The case of the Y. M. C. A. v. Ritter, 90 Kans. 332, 133 Pac. 894, is also cited by the appellant, but a rehearing has been granted in that case and it is still pending.

Cases, however, are not wanting and some are cited, notably U. S. Fidelity & Guaranty Co. v. Rice, 154 Fed. 206, and Knight & Jillson Co. v. Castle, 172 Ind. 97, which are much like the case at bar. In these cases it was held, in substance, that the parties have the right by contract to make such conditions precedent as they may agree upon, and such agreements are enforceable in the courts.

There are, on the other hand, numerous authorities that a surety for hire, an insurer (as the appellant is in this case), is not entitled to the rule of the strictissimi juris. In Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, it was said:

"The question involved is whether the ordinary rule that exonerates the guarantor, in case the time fixed for the performance of the contract by the principal be extended, applies to a bond of this kind executed by a guaranty company, not only for a faithful performance of the original contract, but for the payment of the debts of the principal obligor to third parties. * * * The rule of strictissimi juris is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within reason of the rule, particularly when the bond is underwritten by a corporation, which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor." (Pp. 423, 426.)

Whatever may be the rule elsewhere, the latter rule is well settled in this state. (See Hull v. Bonding Co., 86 Kans. 342; Medical Co. v. Hamm, 89 Kans. 138; Lumber Co. v. Douglas, 89 Kans. 308; The State v. Construction Co., 91 Kans. 74.)

In Lumber Co. v. Douglas, supra, it was said:

"The law does not have the same solicitude for corporations engaged in giving indemnity bonds for profit as it does for the individual surety who voluntarily undertakes to answer for the obligations of another. Although calling themselves sureties, such corporations are in fact insurers, and in determining their rights and liabilities the rules peculiar to suretyship do not apply." (P. 320.)

It did not appear that any damage or loss was sustained by reason of the failure to complete the building within the time specified in the contract, which the notice would have enabled it to avoid.

We are unable to see that the appellant was prejudiced by the admission in evidence of the letters from the attorney for appellee to appellant, or in the instructions given to the jury. The latter objection is in effect that the appellee having failed to comply with the letter of the bond in the matter of notice, damages to appellant should be presumed in the absence of evidence thereof, which claim we can not sustain. The breach of a condition precedent in a bond given by an insurer for pay will not relieve the insurer from liability for any loss for which he would otherwise be liable unless such breach contributed to the loss.

The judgment is affirmed.

West, J. (dissenting): While fully agreeing that bonding companies should be regarded as insurers and not as sureties, I dissent from the second paragraph of the syllabus and the corresponding portion of the opinion on the ground that no decision or number of decisions can furnish any authority to the court to abrogate a valid contract between competent parties and eliminate therefrom a valid condition precedent which they have placed therein. In this case the parties contracted that no liability should attach unless the specified notice should be given; it is entirely different from a contract merely to give such notice, for in that case a breach would have to cause damage before a recovery would be authorized. To eliminate such condition precedent is to make for the parties a new and different contract, which is not a judicial task.

Porter, J.: I concur in the foregoing dissent.

See also Guarantee Co. v. Mechanics' Savings Bank and Trust Co., 80 Fed. 766; Bank of Tarboro v. Fidelity & Deposit Co., 128 N. Car. 366, 38 S. E. 908, 83 Am. St. 682; City Trust, Safe Deposit & Surety Co. v. Lee, 204 Ill. 69, 68 N. E. 485; United States Fidelity and Guaranty Co. v. Golden Pressed and Fire Brick Co., 191 U. S. 416, 48 L. ed. 242.

KIRSCHBAUM & CO. *v.* BLAIR AND OTHERS

98 *Va.* 35, 34 *S. E.* 895 (1900).

The opinion states the case.

Cardwell, J., delivered the opinion of the court.

This is a writ of error to a judgment of the law and equity court of the city of Richmond, and the facts of the case out of which the suit arises are practically uncontroverted. They are as follows:

W. H. Weisiger and S. M. Weisiger, of Richmond, Va., styling themselves W. H. Weisiger & Bro., or Weisiger & Bro., as they will be spoken of in this opinion, entered into a written contract with A. B. Kirschbaum & Co., wholesale clothing merchants of the city of Philadelphia, whereby Weisiger & Bro. agreed to travel for and sell the clothing of Kirschbaum & Co. in the states of North Carolina, Virginia, part of West Virginia and adjacent territory, as directed by Kirschbaum & Co.; Kirschbaum & Co. on their part agreeing to pay Weisiger & Bro. a commission of eight per cent. on all their shipped sales paid for by customers and further agreeing to pay Weisiger & Bro., from time to time, money for traveling and personal expenses as might, in Kirschbaum & Co.'s judgment, be warranted by accepted sales made by Weisiger & Bro. All such advances, however, were to be deducted from the commissions earned by Weisiger & Bro. at the time of final settlement, which, it was stipulated, should be made as nearly as possible at the end of each

season, and if Weisiger & Bro. should not, by the commissions on their joint sales, earn the amount of money so advanced, then they were to be severally and jointly responsible for the sum of money so advanced and not earned under the contract. Weisiger & Bro. agreed to give satisfactory security in the sum of $2,000 that these advances should be promptly returned to Kirschbaum & Co. at any time within sixty days of their notification by Kirschbaum & Co. of a desire for a settlement. By a subsequent provision in the contract Kirschbaum & Co. reserved the right to reject all or part of any orders, at their own discretion, that might be sent in by Weisiger & Bro., and it was agreed that such rejected orders, as well as merchandise returned by customers and "failed accounts," should not be considered as sales under the contract, and that, if commissions had been paid on orders where the goods were returned or where the customers afterward failed, the commissions so paid should be promptly returned to Kirschbaum & Co. by Weisiger & Bro., or their sureties. It was further provided that the contract should remain in force for one year, commencing December 1, 1894.

Pursuant to the contract, Weisiger & Bro., in the form of a bond, bearing the same date of the contract, namely November 24, 1894, gave the security required, Lewis H. Blair and T. A. Jacobs becoming their sureties. The bond was conditioned for the faithful performance by Weisiger & Bro. of all the covenants and conditions of the contract; the contract being referred to and made a part of the bond.

The contract having been made and the bond given, Weisiger & Bro., who had been furnished by Kirschbaum & Co. with a line of samples and lists of prices of the goods to be sold by them, proceeded, in accordance with the contract, to travel and sell the clothing of Kirschbaum & Co. in the territory named, and continued to do so throughout the year beginning December 1, 1894. In the meantime, however, Kirschbaum & Co. had advanced Weisiger & Bro. from time to time considerable sums of money. On October 1, 1895, Kirschbaum & Co. gave Weisiger & Bro. sixty days' notice, as provided for in the contract, that they required a settlement of the accounts between them, and at the same time gave the sureties, Blair and Jacobs, like notice. After some delay, caused in part by the sudden death of W. H. Weisiger, a complete account of the transactions between Weisiger & Bro. and Kirschbaum & Co. was made up by the latter. The account consists of two parts: First, an itemized statement of the sums advanced by Kirschbaum & Co. from time to time to Weisiger & Bro. for traveling and personal expenses, or paid them on account; and, second, a statement of all the sales made by Weisiger & Bro., upon which they were entitled to eight per cent. commission under the contract, and the balance thereby found to be due Kirschbaum & Co. was $1,353.86, upon which they claimed interest from January 1, 1896.

The estate of W. H. Weisiger being insolvent, and S. M. Weisiger being unable to pay the amount claimed by Kirschbaum & Co. on the account rendered, demand was made by them on the sureties on the bond given by Weisiger & Bro. for the payment of the balance of $1,353.86, with interest shown to be due Kirschbaum & Co. by the account, and the sureties, Blair and Jacobs, refusing to pay this balance, this suit was instituted, and at the trial thereof there was a verdict and judgment for the defendants, and the case is before us upon a writ of error.

It appears that on November 29, 1894, Kirschbaum & Co. advanced to Weisiger & Bro. $100, and on the 3d of December, 1894, $400, which amounts were used by Weisiger & Bro., it is claimed, in purchasing railroad mileage books, and by February 11, 1895, their advancements to Weisiger & Bro. aggregated $1,368, when the gross sales made by them, none of which had been accepted by Kirschbaum & Co., amounted to only $53.50.

It further appears that the total sales made by Weisiger & Bro., accepted by Kirschbaum & Co., amounted to only $11,522.25, upon which they were entitled to commissions at eight per cent., $921.78, while the total advancements made to them amounted to $2,275.64.

It was contended by Blair and Jacobs, the sureties for Weisiger & Bro., that the advancements, or the greater part of them, made by Kirschbaum & Co. to Weisiger & Bro. were not authorized by the terms of the contract between the parties, and that therefore they, as the sureties on the bond, were not bound for the balance claimed by Kirschbaum & Co. and sued for in this action.

At the trial the plaintiffs asked for five instructions, and the defendants also asked for five instructions, all of which were refused except the defendants' first instruction, which is as follows:

"Any dealings between the principal debtor and the creditor which varies the situation, right or remedies of the surety after the contract is made will release him; and if the jury believe from the evidence that the plaintiffs made a contract with the Weisigers which, on its face, was not to go into force until the 1st of December, 1894, and which provided that the money which was to be advanced under its provisions to said Weisigers, and for the return of which, under certain conditions, the defendants were to be bound as sureties, was to be advanced from time to time, 'as may in the judgment of the plaintiffs be warranted by accepted sales' made by said Weisigers for said plaintiffs, and that the plaintiffs advanced money to the said Weisigers before the 1st day of December, 1894, and before there were any accepted sales, without the knowledge or consent of said defendants, these facts operate as a release of the sureties, and the jury should find for the defendants."

Plaintiffs' exceptions to the action of the lower court in giving the above instruction, and in refusing the five instructions asked for on

1 their behalf, present the only question that need be considered, viz.: What is a proper construction of the contract between the parties?

While, as contended by counsel for plaintiffs in error, the contract of a surety or guarantor being just as legal as that of the principal, there is no good reason for holding that, in arriving at the intention of the parties, one set of rules shall govern when the principal, another when the surety or guarantor is concerned, that is to say, that a certain set of words in a contract mean one thing when the principal is defendant, and that the same words in the same contract mean another thing simply because the defendant is a surety or guarantor, is absurd, and while the meaning of the words is not to be affected by the fact that the party sought to be charged is principal, surety or guarantor (Brandt on S. & G., § 94; Gates v. McKee, 13 N. Y. 232; Belloni v. Freeborn, 63 N. Y. 388; Collier v. So. Ex. Co., 32 Gratt. 718), yet the authorities cited do not stop there. Brandt on S. & G., continuing, in section 94, says: "On the other hand, a surety or guarantor usually derives no benefit from his contract. His object generally is to befriend the principal. In most cases the consideration moves to the principal, and he would be liable upon an implied contract, while the surety or guarantor is only liable because he has agreed to become so. He is bound by his agreement, and nothing else. No implied liability exists to charge him. It has been repeatedly decided that he is under no moral obligation to pay the debt of his principal. Being bound by his agreement alone, and deriving no benefit from the transaction, it is eminently just and proper that he should be a favorite of the law, and have a right to stand upon the strict terms of his obligation. To charge him beyond its terms, or to permit it to be altered without his consent, would be, not to enforce the contract made by him, but to make another for him."

It is also well settled that, in the construction of the contract of a surety or guarantor, as well as of every other contract, the true question is, what was the intention of the parties as disclosed by the instrument read in the light of the surrounding circumstances? But when the contract of a guarantor or surety is duly ascertained and understood from the written language in which he has contracted, the case must be brought strictly within the guaranty, and the liability of the surety can not be extended by implication. His liability is always strictissimi juris, and can not be extended by construction. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. The undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms. McClusky v. Cromwell, 1 Kernan 598; Smith v. U. S., 2 Wall. 237; Blanton v. Commonwealth, 91 Va. 1; Ayers v. Hite, 97 Va. 466, and authorities cited.

There would seem to be some conflict between the authorities just cited and the authorities cited by counsel for the plaintiffs in error in support of their contention that the instrument in this case is to be liberally construed, but there is really none. Mr. Justice Story, in Lawrence v. McCalmont, 2 How. 426, does say: "We have no difficulty whatsoever in saying that instruments of this sort (letters of credit) should receive a liberal interpretation," but, says he, "by a liberal construction we do not mean that the words should be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed, and the purposes to which it is to be applied."

In Gates v. McKee, supra, Denio, J., refers, with approval, to Lawrence v. McCalmont—quoting at length from Story, J.—and to other authorities, to sustain the view that there is no reason for putting on a guaranty a construction different from what is put on any other instrument; that with regard to other instruments, the rule is that if the party executing leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself, but he adds: "There is a sense, undoubtedly, in which it may be said these obligations (of sureties) are to be strictly construed, and it is this: That the surety is not to be held beyond the very precise stipulations of his contract. But where the question is as to the meaning of the written language in which he has contracted, there is no difference, and there ought not to be any, between the contract of a surety and that of any other party." To the same effect is the decision of the court in Belloni v. Freeborn, supra, and other cases cited by plaintiffs in error.

The writing may be read in the light of the surrounding circumstances in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing the only outward and reliable expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the court in such cases is to ascertain, not what the parties may have secretly intended, as contra-distinguished from what their words expressed, but the meaning of the words they have used. 1 Green. Ev., § 277.

As said by Mr. Justice Strong, in Maryland v. R. R. Co., 22 Wall. 113: "Ordinarily a reference to what are called 'surrounding circumstances' is allowed for the purpose of ascertaining the subject-matter of a contract, or for an explanation of the terms used, not for the purpose of adding a new and distinct undertaking."

In the case at bar the clause in the contract, especially in dispute, reads: "The firm (Kirschbaum & Co.) further agrees to advance to said W. H. Weisiger & Bro. from time to time money for traveling and personal expenses, as may in their judgment be warranted by his accepted sales."

Plaintiffs in error accept as correct the rule of law laid down in Ex. Building &c. Co. v. Bayless, 91 Va. 134; Blanton v. Commonwealth, supra; Ayers v. Hite, supra, but contend that when the contract is "fairly and reasonably interpreted, according to the intent of the parties as disclosed by the instrument, read in the light of surrounding circumstances and the purposes for which it was made," they were authorized to make the advances in question without regard to the "accepted sales" made by Weisiger & Bro. This view is the trend of the instructions asked for by plaintiffs in error at the trial, and refused by the court. If that construction of the contract is to prevail, the undertaking by the bond was in no way limited either by the contract as a whole, or the words: "The firm further agrees to advance to the said W. H. Weisiger & Bro. from time to time money for traveling and personal expenses, as may, in their judgment, be warranted by his (their, W. & Bro.) accepted sales." It is necessary to that construction to strike out the words quoted, or to give them no meaning or import. But say plaintiffs in error, they are entitled to force and effect, and left it to their judgment to say what advancements they might make to Weisiger & Bro., and when, their prime object being to make large sales and profits, and the contract and security was as to them a secondary consideration. This may have been the purpose and aim of plaintiffs in error, but it is not, by any reasonable construction, what the language employed in the contract means. There is nothing in the contract to justify a broader liability on the defendants in error, as sureties on the bond, than for advances "warranted by accepted sales"—warranted, or justified, in the judgment of plaintiffs in error, fairly and honestly exercised, as defendants in error had a right to rely, by "accepted sales;" all such advances to be deducted from the commissions earned by Weisiger & Bro., at the time of final settlement; and if not earned by them on their joint sales, they were to be jointly and severally bound for the sums so advanced, as well as for commissions which had been paid to them upon sales of goods returned to plaintiffs in error, and Weisiger & Bro., or their sureties, defendants in error, were to repay such advancements and commissions.

We do not say, and do not mean to say, that plaintiffs in error were not authorized to advance to Weisiger & Bro., under the contract, any sum or sums of money beyond the commissions on their "accepted sales," but we do say that plaintiffs in error were not authorized to make any advances to Weisiger & Bro. not "warranted," in the judgment of the plaintiffs in error, by "accepted sales" made by Weisiger & Bro. Indeed this seems to have been the view taken by them when they wrote to W. H. Weisiger, March 9, 1895: "You (Weisiger) know you have drawn at least $1,000 more than what you are entitled to according to your sales," and they also admit in the same letter that they had already been ad-

vancing money to Weisiger & Bro. for "private purposes," and were not authorized to make any advances except for "business purposes." Why refer in that letter to the restrictions upon the right of Weisiger & Bro. to draw advancements, if they had the right to ask, and plaintiffs in error the right to make advancements, regardless of the sales made by Weisiger & Bro.? Why put the clause in the contract if it was only to serve the purpose of reserving the right to plaintiffs in error to exercise their judgment as to what advances they would make to Weisiger & Bro., and when? They had that right already without such a stipulation.

Plaintiffs in error were wholesale merchants, widely known, conducting a very large business, extending over many states, and it was reasonable for defendants in error to rely, and doubtless they did rely, for their protection, as sureties for Weisiger & Bro., upon the restriction in the contract of advancements to the latter to such as would be "warranted," in the judgment of plaintiffs in error, fairly and honestly exercised, by "accepted sales," made by Weisiger & Bro. There is nothing in the contract, as plaintiffs in error seem to contend was their situation, to have led defendants in error to the belief that Weisiger & Bro. were in straitened circumstances, and unable to work without considerable advances from plaintiffs in error. On the contrary, the language of the contract was well calculated to justify the belief, as testified to by one of the defendants in error, that Weisiger & Bro. had sufficient money to travel and sell goods for plaintiffs in error until there were "accepted sales." We agree with counsel for defendants in error that it is a very different thing to become surety for the return of advances by a man circumstanced as plaintiffs in error claim their agents (W. & B.) were—unable even to begin their work without receiving large advances—and to become surety for one situated as the sureties here had the right to believe from the contract Weisiger & Bro. were, to wit: Possesssed of enough means to carry on the business until there were "accepted sales" sufficient to justify advances.

In Blanton v. Commonwealth, supra, Keith, P., says: "The correct rule, says the Supreme Court of the United States (2 Wall. supra) is that any variation in the agreement to which the surety has subscribed, which was made without the surety's knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one subscribed, will discharge the surety."

In that case the sureties subscribed to a bond duly accepted by the county court of Amelia county, in which their liability was divided among eight, while the attempt was made to enforce a liability upon a bond in which there were but seven obligors, and it was held that the sureties were not bound. See also Calvert v. London Dock Co., 2 Keen 639; Mayhew v. Boyd, 5 Md. 110; Bragg v. Shain, 49 Cal. 131; Simonson v. Grant, 36 Minn. 439.

The question in the last case was whether or not the sureties upon a bond for the faithful performance of the provisions of a builder's contract were discharged by the owner of the house making payments to the builder at times before they were due under the contract. The grounds upon which the court held the sureties discharged were that, after the work was commenced, and the first instalment of the contract price paid, and before the building materials were furnished by the contractors, the owner of the house so far departed from the terms of the contract that payments were made by him to divers persons on the order of the contractors, without reference to the state of the work or the terms of the contract, and in some instances to an amount exceeding the instalments due, as stipulated therein, and in anticipation thereof.

In this case, with a provision in the contract authorizing advances to Weisiger & Bro., when "warranted" by their "accepted sales," plaintiffs in error not only seek to enforce a liability on defendants in error for large advances to their principals, for private as well as business purposes, before they were "accepted sales"—advances before there were any sales at all—but also an advance before the contract went into effect. To enforce this demand it would have to be held that a surety was bound for what his principal was bound, although it is conceded that his liability is strictissimi juris, and that to the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further.

We are of opinion that the court below did not err in refusing the instructions asked by plaintiffs in error and giving the instructions set out above. Nor did the court err in refusing the instructions asked by plaintiffs in error and giving the instructions set out above. Nor did the court err in refusing plaintiffs in error a new trial. Therefore its Judgment is affirmed.

Affirmed.

Keith, P., and Riely, J., dissent.

JAMES B. BRADSHAW AND ANOTHER *v.* L. ELDRIDGE BARBER

125 *Minn.* 479, 147 *N. W.* 650 (1914).

Philip E. Brown, J.: Action to recover upon a continuing guaranty. Plaintiffs had a verdict, which, on defendant's motion, was vacated and judgment ordered for defendant notwithstanding. Plaintiffs appealed from a judgment entered accordingly.

The facts are undisputed. In 1910 defendant's sister, Miss Barber, contemplated engaging in the millinery business at Bridgewater, South Dakota, and sought to purchase stock therefor from

plaintiffs. In order that she might obtain credit, defendant executed the following instrument, addressed to plaintiffs:

"In consideration of your furnishing to Miss Lottie J. Barber, of Bridgewater, S. D., goods as desired by her for four months from date and to the amount of two hundred dollars ($200.00), and such additional goods as she may desire within said period, or from time to time thereafter, I hereby agree to be liable for the same, and extensions of time of payment may be granted by you without releasing me from such liability. Notice of acceptance of this guaranty and default in payment is hereby expressly waived."

Plaintiffs duly notified defendant of acceptance of the guaranty, and between its date, March 7, 1910, and June, 1912, Miss Barber conducted such business at Bridgewater, purchasing goods from plaintiff on credit and making payments on account from time to time. During the month last mentioned she disposed of the business, of which plaintiffs were advised, being then indebted to them in the sum of $37.27. Later she again engaged in business of the same kind at Two Harbors, Minn., continuing to purchase goods on credit from plaintiffs, until October, 1912, when she again went out of business. She remitted from Two Harbors only $150.00, which plaintiffs first applied in payment of the $37.27 balance, leaving due them, for goods purchased by her for the Two Harbors business, the sum of $555.51, for which amount defendant is sought to be charged as guarantor.

Defendant urges several grounds in support of the court's action, among them that the guaranty, being given to pay for goods purchased for the Bridgewater business, he can not be held for any purchases made from Two Harbors; which presents the only question necessary to determine. Considering the guaranty literally, this contention could not be sustained; for, if its wording alone is controlling, defendant must be deemed to have bound himself to pay for all goods of all kinds which his sister might purchase from plaintiffs, without limitation as to time or place. Such broad interpretation is inadmissible; for this court has held that a guaranty without limitation in terms as to time or amount can not be unreasonably extended as to either, and each must be reasonable under all circumstances of the case. Lehigh Coal & Iron Co. v. Scallen, 61 Minn. 63. Should the same rule be applied as to place? This question depends upon the applicable rule of construction. It should be remembered that contracts of this kind are in general use in mercantile transactions and that they facilitate business in many ways, among other things often aiding persons to engage in profitable enterprises which, from lack of credit, they would otherwise be unable to undertake. Failure to bear these characteristics in mind and the close relation between guaranty and suretyship on the one hand, and an exaggeration of the rights of creditors on the other, have led to the promulgation of antagonistic rules, one

calling for strict and the other for liberal construction of the guarantor's undertaking. The true rule, however, and the one sustained by what appeals to us as the better considered authorities, lies between these two, and is that a mercantile credit guaranty should be neither extended beyond the fair import of its terms nor unduly restricted by technical interpretation. This rule is well stated in Hooper v. Hooper, 81 Md. 155.

"A guaranty," said Mr. Justice McSherry at page 169, "is a mercantile instrument to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical accuracy, but in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse. It should be given that effect which will best accord with the intention of the parties as manifested by the terms of the guaranty, taken in connection with the subject-matter to which it relates, and neither enlarging the words beyond their natural import in favor of creditor, nor restricting them in aid of the surety. The circumstances accompanying the whole transaction may be looked to in ascertaining the understanding of the parties."

Again, in London & San Francisco Bank v. Parrott, 125 Cal. 472, the rule is clearly propounded, at pages 481 and 482, as follows:

"When it is said that a guarantor is entitled to stand upon the strict terms of his guaranty, nothing more is intended than that he is not to be held liable for anything that is not within the express terms of the instrument in which his guaranty is contained; that his liability is not to be extended by implication beyond these limits, or to other objects than those expressed in the instrument of guaranty. But for the purpose of ascertaining the meaning of the language which he has used, and thus determining the extent of his guaranty, the same rules of construction are to be applied as are applied in the construction of other instruments. His liability is not to be extended by implication beyond the terms of his guaranty as thus ascertained. The language used by him is, however, to receive a fair and reasonable interpretation for the purpose of effecting the objects for which he made the instrument, and the purpose to which it was to be applied."

See 105 Am. St. 520, note. See also Fall v. Youmans, 67 Minn. 83, where Mr. Justice Mitchell said, with reference to a guaranty of collection of a note:

"The guaranty must be interpreted in reference to the situation and condition of the maker of the note, actual or rightfully assumed, at the time the guaranty was made."

And, for an illustrative case indicating how far the courts have gone in this connection, see John H. Lyon & Co. v. Plum, 75 N. J. L. 883.

The ruling of this court in Lehigh Coal & Iron Co. v. Scallen, supra, was merely an application of the rule of construction above

stated in determining the scope of the guaranty with reference to time and amount, and we can conceive of no reason why the same rule should not be applied in determining the question as to limitation of place. The true inquiry in each case is: What may fairly be said to have been contemplated by the parties when the instrument was executed, giving due effect to every part and also having proper regard for surrounding circumstances? The answer to this inquiry in the present case is, clearly, that neither of the parties contemplated, when the guaranty was executed, that Miss Barber would engage in business in Minnesota; for her change of location resulted wholly from causes arising long thereafter. Hence, notwithstanding the general language used, we hold, following the rules stated, that defendant was not bound to respond for purchases made while Miss Barber was in business at Two Harbors. Otherwise it would follow that, no matter where she might subsequently have located in business, defendant would still have remained liable. He might well have been willing to guarantee her purchases while she was doing business at Bridgewater, and yet have refused to bind himself with reference to another location, had such been under consideration. In the nature of things such a change of location could not be made without materially affecting the risk, thus constituting a departure from the original engagement of the parties. If, therefore, the guarantor be held bound without subsequent consent, which does not here appear, it would have to be by virtue of a contract upon the terms of which the minds of the parties never met. Prima facie, a guaranty of the kind under consideration is essentially local.

The conclusion reached amounts merely to an extension of our prior holdings as to time and amount by applying the principle underlying them to the correlated element of place. And, while there is dearth of authority specifically in point, our determination is not unsupported by closely analogous cases. See Wheeler & Wilson Mfg. Co. v. Brown, 65 Wis. 99; Johnson v. Brown, 51 Ga. 498; Singer Mfg. Co. v. Armstrong, 7 Kan. App. 314; Rouss v. King, 74 S. C. 251, trends to the contrary.

Judgment affirmed.

See also Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669.

"In harmonizing apparently conflicting clauses of the contract they must be construed so as to give effect to the intention of the parties as gathered from the whole instrument, and where the object to be accomplished is declared in the instrument the clause which contributes most essentially to that object will control." Mills-Carleton Co. v. Huberty, 84 Ohio St. 81, 95 N. E. 383.

CHAPTER II

THE STATUTE OF FRAUDS

SECTION 1. THE ENGLISH STATUTE

29 *Car.* 2, *C.* 3, *S.* 4 (1677).

"No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; unless the agreement upon which action ~~shall be~~ brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized."

Note: For form and contents of the memorandum sufficient to comply with the statute, see Williams v. Lake, 2 Ell. & Ell. 349; Palmer v. Baker, 23 Up. Can. 302; Holmes v. Mitchell, 7 C. B. (N. S.) 361; Lightbound v. Warnock, 4 Ont. 187; Dodge v. Lean, 13 Johns. (N. Y.) 508; Kling v. Bordner, 65 Ohio St. 86, 61 N. E. 148; Moore v. Eisaman, 201 Pa. 190, 50 Atl. 982; McManus v. Boston, 171 Mass. 152, 50 N. E. 607; Lamkin v. Baldwin & Lamkin Mfg. Co., 72 Conn. 57, 43 Atl. 593, 1042, 44 L. R. A. 786.

The word "agreement" as used in the statute has been construed as embracing not only the general terms of the bargain, but also the consideration for the promise. This was the construction placed upon it in the case of Wain v. Warlters, 5 East 10, decided in 1804. The court held that the words "promise" and "agreement" did not mean the same thing and that to satisfy the statute not only must the "promise" of the guarantor be in writing, but the whole "agreement," including the consideration for the "promise," must also be in writing. This decision established the rule in England until 1856, when by the enactment of the Mercantile Law Amendment it became unnecessary to express the consideration in writing.

In America the courts have not generally followed the rule announced in Wain v. Warlters, although the legislatures of Alabama, Minnesota, Nevada, Oregon and Wisconsin have enacted statutes which require the consideration to be expressed in writing.

For cases contra to Wain v. Warlters, see Packard v. Richardson, 17 Mass. 122, 9 Am. Dec. 123; Sage v. Wilcox, 6 Conn. 81; Dorman v. Bigelow, 1 Fla. 281; Gillighan v. Boardman, 29 Maine 79; Halsa v. Halsa, 8 Mo. 303; Reed v. Evans, 17 Ohio 128; Moore v. Eisaman, 201 Pa. 190, 50 Atl. 982; Britton v. Angier, 48 N. H. 420; Drake v. Seaman, 97 N. Y. 230; Patchin v. Swift, 21 Vt. 292.

SECTION 2. PROMISE MADE TO THE DEBTOR

EASTWOOD *v.* KENYON

11 *Ad. & El.* 438 (1840).

Lord Denman, C. J.: The first point in this case arose on the fourth section of the statute of frauds, viz., whether the promise of the defendant was to "Answer for the debt, default, or miscarriage of another person."

The facts were that the plaintiff was liable to a Mr. Blackburn on a promissory note; and the defendant, for a consideration, which may for the purpose of the argument be taken to have been sufficient, promised the plaintiff to pay and discharge the note to Blackburn. If the promise had been made to Blackburn, doubtless the statute would have applied; it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another because the promise is made to that other, viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise contemplated by it is to be made. But upon consideration we are of opinion that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one.

Rule to enter verdict for defendant discharged.

Accord: Hargreaves v. Parsons, 13 M. & W. 561.

PELEG ALDRICH *v.* PHILANDER AMES

9 *Gray (Mass.)* 76 (1857).

SHAW, C. J.: The case in substance is, that the plaintiff, at the request of the defendant, and for a valuable consideration, became bail for John A. Crehore, upon which the defendant promised the plaintiff to indemnify and save him harmless.

The ground of defense is, that this was an alleged promise of the defendant to pay the debt of another, and therefore that the action can not be maintained without an agreement in writing, because it is within the statute of frauds.

The court is of the opinion that this ground is wholly untenable. This is a promise by the defendant to another, to pay his debt, or, in other words, to save him from the performance of an obligation which might result in a debt. But it is a promise to the debtor to pay his debt, and thereby to relieve him from the payment of it himself, which is not within the statute of frauds.

The theory of the statute of frauds is this, that when a third party promises the creditor to pay him a debt due to him from a person named, the effect of such a promise is to become a surety or guarantor only, and shall be manifested by written evidence. The promise in such case is to the creditor, not to the debtor. For instance, if A, a debtor, owes a debt to B, and C promises B, the creditor, to pay it, that is a promise to the creditor to pay the debt of A. But in the same case, should C, on good consideration, promise A,

the debtor, to pay the debt to B and indemnify A from the payment, although one of the results is to pay the debt to B, yet it is not a promise to the creditor to pay the debt of another, but a promise to the debtor to pay his debt.

This rule appears to us to be well settled as the true construction of the statute, well confirmed by authorities. Eastwood v. Kenyon, 11 Ad. & El. 438, and 3 P. & Dav. 276; Harrison v. Sawtel, 10 Johns. 242; Chapin v. Merrill, 4 Wend. 657; Chapin v. Lapham, 20 Pick. 467; Alger v. Scoville, 1 Gray 395.

Exceptions overruled.

Accord: Moore v. First Nat. Bank, 139 Ala. 595, 36 So. 777; Windell v. Hudson, 102 Ind. 521, 2 N. E. 303; Patton v. Mills, 21 Kans. 163; Green v. Brookins, 23 Mich. 48, 9 Am. Rep. 74; Ware v. Allen, 64 Miss. 545, 1 So. 738, 60 Am. Rep. 67; Brown v. Brown, 47 Mo. 130, 4 Am. Rep. 320; Wood v. Moriarity, 15 R. I. 518, 9 Atl. 427.

SECTION 3. PROMISE OF INDEMNITY

W. THOMAS *v.* WILLIAM COOK

8 *Barnewall & Creswell* 728 (1828)

Assumpsit. The declaration stated that on, etc., a certain partnership in trade between one W. Cook, since deceased, and one N. D. Morris, was dissolved; that it was agreed between W. Cook, since deceased, and Morris, that the former should take upon himself the payment of certain debts (specified in the declaration); and that it was also agreed that a bond of indemnity, executed by W. Cook, since deceased, and two other persons, should be given to Morris, to save himself harmless from the payment of the said debts. And thereupon, afterward, to wit, on, etc., in consideration that the plaintiff, at the request of the defendant, would, together with the defendant and W. Cook, since deceased, execute a bond of indemnity to Morris in the sum of £4,100 conditioned to save him harmless from the said debts; the defendant undertook and promised the plaintiff that he, the defendant, would save harmless and indemnify him from all payments, damages, costs, and expenses which he (plaintiff) should or might incur, bear, pay, sustain, or be put unto by reason or means of his so executing the said writing obligatory. Averment that plaintiff was afterward compelled to pay on account of the said debts the sum of £360, and that defendant had not indemnified him. The second and third counts were in substance the same. The fourth count alleged that in consideration that the plaintiff, at the request of the defendant, would, as surety for W. Cook, since deceased, together with the said W. Cook and the de-

fendant, make and draw a certain bill of exchange for £500 upon certain persons (named), and would indorse and deliver the same to Morris, in order that he might negotiate the same for his own use, the defendant undertook to indemnify the plaintiff from any loss or damage by reason of his drawing and indorsing the bill. Averment that plaintiff did draw and indorse the bill in manner aforesaid, and was afterward by reason thereof compelled to pay it, whereof the defendant had notice, but did not indemnify him. Counts for money lent, paid, had, and received, and on an account stated. Plea, the general issue. At the trial before Park, J., at the Hereford Lent assizes, 1828, it appeared that the plaintiff and defendant had executed the bond, and drawn the bill mentioned in the declaration; that the defendant had requested the plaintiff to do so, and promised that he should not be a loser. It was also proved, that on account of payments made by the plaintiff toward the debts specified, and the bill of exchange, a sum of £400 remained due to him in 1825. After this time the plaintiff received from the estate of W. Cook, since deceased, £100, leaving a deficiency of £300. For the defendant it was contended that the plaintiff could not recover on the special counts for want of a written agreement, the promise there laid being to answer for the debt of a third person, and consequently that he could only recover against the defendant as co-surety on the count for money paid, one moiety of the £300. The learned judge directed the jury to find a verdict for the plaintiff for £300, and gave the defendant leave to move to reduce it to £150. A rule nisi for that purpose was obtained in Easter Term, against which Taunton and Chilton now showed cause.

Bayley, J.: It is provided by the fourth section of the Statute of Frauds, that "No action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized." Here the bond was given to Morris as the creditor; but the promise in question was not made to him. A promise to him would have been to answer for the default of the debtor. But it being necessary for W. Cook, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and bill of exchange, and undertook to save him harmless. A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the Statute of Frauds; and if so, there was sufficient evidence to entitle the plaintiff to a verdict for £300.

Parke, J.: This was not a promise to answer for the debt, default or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid

money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same. The rule for reducing the verdict ought, therefore, to be discharged.

Rule discharged.

Accord: Reader v. Kingham, 13 C. B. (N. S.) 344; Guild & Co. v. Conrad, [1894] 2 Q. B. D. 885.

GREEN *v.* CRESSWELL

10 *Adolphus & Ellis* 453 (1839).

Assumpsit. The first count of the declaration stated that, on 2d February, 1836, a capias, directed to the sheriff of Warwickshire, issued from the Court of Exchequer against one Joseph Hadley, at the suit of one John Reay, which was indorsed for bail for £135, and was delivered to the sheriff, who, on the day and year aforesaid, arrested Hadley; that afterward, to wit, 9th February, 1836, in consideration that plaintiff, at the request of defendant, would become bail and surety for Hadley, and would, as such bail and surety, seal, and as his act and deed, deliver to the said sheriff, a bail bond, conditioned for putting in special bail by Hadley, defendant, then promised plaintiff that he, defendant, would save harmless and indemnify plaintiff from all payments, damages, costs, and expenses which he, plaintiff, should or might incur, bear, pay and sustain, or be put unto by reason or by means of so becoming bail and surety; that plaintiff, confiding, etc., did afterward, to wit, on the day and year last aforesaid, at the request, etc., seal and deliver the bail bond, but that Hadley did not put in special bail, whereby the bond became forfeited; that afterward, to wit, 15th February, 1836, the sheriff assigned the bail bond to Reay, who thereupon afterward, to wit, on the day and year last aforesaid, sued the present plaintiff on the bond in the Court of Exchequer, and recovered judgment for £75 5s. damages and costs; and afterward, to wit, 11th August, 1836, sued out execution by fieri facias against the now plaintiff, who was thereby compelled to pay £98 6s.; of all which defendant had notice. Breach that defendant had not indemnified plaintiff, nor repaid him any of the £98 6s., nor divers other sums expended for costs, etc., to wit, £50, etc.

Pleas. 1. Non assumpsit. Issue thereon.

2. The Statute of Frauds.

On the trial before Park, J., at the Warwickshire Summer Assizes, 1837, evidence was given of the promise, as stated in the declaration; but no evidence was given of any writing. The learned judge was of opinion that the case was not within the Statute of Frauds; and a verdict was found for the plaintiff, on the replication of the

second plea. In Michaelmas Term, 1837, Goulburn, Sergeant, obtained a rule for a new trial, or arrest of judgment.

LORD DENMAN, C. J., afterward in this term (June 11th), delivered the judgment of the court. After stating the facts, his lordship proceeded as follows:

A motion has been made in arrest of judgment, the promise appearing by the plea not to have been in writing, and the replication only averring in answer that it was not a special promise to answer the debt or default of another.

The promise in effect is, "If you will become bail for Hadley, and Hadley, by not paying or appearing, forfeits his bail bond, I will save you harmless from all the consequences of your becoming bail. If Hadley fails to do what is right toward you, I will do it instead of him."

If there had been no decisions on the subject, it would appear impossible to make a reasonable doubt that this is answering for the default of another. The case most relied on by the plaintiff is that of Thomas v. Cook, where this court held that a promise of B to hold A harmless against the consequences of his entering with B and C, at B's request, into a joint bond to indemnify D against debts due from C and D was binding, though not in writing; Bayley, J. and Parke, J., the only judges present, saying that a promise to indemnify does not fall within the words or policy of the statute. But the reasoning in this case does not appear to us satisfactory in support of the doctrine there laid down, which, taken in its full extent, would repeal the statute. For every promise to become answerable for the debt or default of another may be shaped as an indemnity; but, even in that shape, we can not see why it may not be within the words of the statute. Within the mischief of the statute it most certainly falls.

Adams v. Dansey, 6 Bing. 506, does not bear out the general doctrine. That was a promise by one parishioner to indemnify another against the consequences of resisting a claim of tithe. This is not becoming responsible for debt or default of any other, but merely promising to pay what the promisee may lose by defending the promisor's interests in a suit.

In some of the cases the language employed seems to assume that the debt, default, or miscarriage must have been incurred at the time of making the promise. But the common case of becoming responsible for goods supplied to another on the faith of that promise, and of course after it, shows that criterion to be inadmissible.

A distinction was also hinted at, from the circumstance of Hadley's debt being due to a third person, and the default therefore incurred toward him, not toward the bail. But here again is the surmise of an intention in the legislature which none of its language bears out; and, besides, may it not be said that the arrested debtor,

who obtains his freedom by being bailed, undertakes to his bail to keep them harmless, by paying the debt, or surrendering?

There does not appear any objection to the test laid down in the note to 1 Williams' Saunders, 211 c.; and it is decisive in favor of the objection. The original party remained liable; and the defendant incurred no liability except from his promise.

Rule absolute for arresting the judgment.

See also Cripps v. Hartnoll, 4 B. & S. 414.

WILDES *v.* DUDLOW

Law Reports, 19 *Equity* 198 (1874).

This was a suit for the administration of the estate of John Dudlow, who died in 1854. The bill was filed in 1868 by legatee. The cause was heard in 1870, and the common administration decree was made. The estate proved insufficient to pay the legacies in full. Thereupon the plaintiffs took out a summons to vary the chief clerk's certificate by striking out a sum of £1,000, which John Noble Dudlow, the son and one of the executors of the testator, had been allowed to charge against the estate and retain under the following circumstances:

In the year 1853, the testator, who had often assisted his son-in-law, Henry Atkinson Wildes, in raising money, requested his son, John Noble Dudlow, to join Henry Atkinson Wildes in a joint and several promissory note for £1,000, saying that he (the testator) did not like his (the testator's) name going so often to Randall & Co., from whom Henry Atkinson Wildes intended to raise the said sum, and offering to indemnify the said John Noble Dudlow from any loss that might arise from his joining the said note. John Noble Dudlow was afterward compelled to pay the said sum, and the chief clerk had allowed his claim in respect of such payment.

Sir R. Malins, V. C.: The question is, whether this contract is, within the fourth section of the Statute of Frauds, required to be in writing. The words of that clause are, "charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another." What was the promise made by the testator in this case to the defendant John Dudlow? It was not, "I engage with you to be answerable to you for the debt of Wildes," because Wildes did not owe Dudlow anything, but he says, "If you will do a certain act—namely, render yourself liable for that debt—I will indemnify you." I think it perfectly clear that the only contract which I have to consider is that between father and son. It is not that he will pay the debt of Wildes, but that if the son will guar-

antee Wildes' debt, he will see him harmless, or, in other words, indemnify him. If one man could induce another to alter his line of conduct in that way, and then meet him with the Statute of Frauds, that statute, instead of being a protection against fraud, would be the direct means of fraud. The statute enacts that if one man promises to pay the debt of another the promise is void unless it is in writing, and no one doubts that to be the law; but it appears to me, upon principle, so plain that the present case is not within the statute, that I am very glad to find that what occurred to me as being the proper view of the case is finally decided to be the law on the subject. There has been a conflict of authority, and I confess I am surprised to find that there has been so much conflict. The point was originally decided by two of the most eminent judges known on the bench (Mr. Justice Bayley and Mr. Justice Parke, afterward Lord Wensleydale) in the case of Thomas v. Cook, and they decide it upon the plainest principles of common sense and justice. I was therefore surprised to find that in a later case of Green v. Cresswell the same court, constituted at that time of other judges, had taken a different view, and a view which, if it had been maintained, I possibly should not have felt myself obliged to follow. But I am happy to find that, the matter having been most carefully and elaborately considered in the case of Reader v. Kingham, when the full number of judges was present, the case of Green v. Cresswell was overruled, and the law as laid down by Thomas v. Cook restored. The learned judges commented upon those cases, and said that the law was accurately laid down in Thomas v. Cook; and I entirely agree in that expression of opinion. I accordingly decide that where one person induces another to enter into an engagement, by a promise to indemnify him against liability, that is not an agreement within the Statute of Frauds, and does not require to be in writing. This is a case in which a father induced his son to guarantee the debt of his son-in-law upon a promise that he would see him harmless. Upon every principle of justice he is bound to indemnify him; and I think, therefore, that the son is perfectly right in helping himself out of the estate which has come into his hands. The force of the decision in Reader v. Kingham, 13 C. B. n. s. 344, was somewhat shaken by the opinion expressed by Mr. Justice Blackburn in Mountstephen v. Lakeman, Law Rep. 5 Q. B. 613; but, as the decision of the Queen's Bench in that case was reversed in the Exchequer Chamber, Law Rep. 7 Q. B. 196, and also in the House of Lords, Law Rep. 7 H. L. 17, the law rests on the plain and reasonable ground upon which it was put in Reader v. Kingham, 13 C. B. n. s. 344. The decision is, therefore, entirely in favor of the defendant; and I hold that the Chief Clerk has done perfectly right in allowing this £1,000 with interest. Therefore the motion to vary the certificate in that respect must be dismissed with costs.

Accord: Smith v. Delaney, 64 Conn. 264, 29 Atl. 496, 42 Am. St. 181; Resseter v. Waterman, 151 Ill. 169, 37 N. E. 875; Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162; Jones v. Bacon, 145 N. Y. 446, 40 N. E. 216; Rose v. Wollenberg, 31 Ore. 269, 44 Pac. 382, 39 L. R. A. 378, 65 Am. St. 826; Demeritt v. Bickford, 58 N. H. 523.

JOHN HARTLEY, DEFENDANT IN ERROR, *v.* CORNELIUS SANDFORD, PLAINTIFF IN ERROR

66 *N. J. L.* 627, 50 *Atl.* 454, 55 *L. R. A.* 206 (1901).

The opinion of the court was delivered by Dixon, J.

The material facts in this case, as disclosed by the record, are that the defendant's son was indebted to M., who desired additional security; that thereupon the defendant applied to the plaintiff to become surety for the son, and promised him that if he was compelled to pay the debt, he (the defendant) would reimburse him; that accordingly the plaintiff became surety for the son, and subsequently was obliged to pay the debt. This suit was brought upon the promise, which was oral only.

It appears that at the trial in the Passaic Circuit the jury were instructed to find for the plaintiff if they were satisfied the promise had been made, but the question as to the legal sufficiency of the promise was reserved and certified to the Supreme Court, which afterward advised the circuit that the promise was valid, and thereupon judgment was entered on the verdict.

In this court error has been assigned on the charge at the circuit, as well as on the advisory opinion of the Supreme Court, but there being no bill of exceptions presenting the charge, the assignment of error respecting it is futile and must be disregarded.

The assignment upon the opinion of the Supreme Court is legal, and presents the only question now before us, which is, whether the plaintiff's suit can be maintained, in view of our statute "that no action shall be brought to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the person to be charged therewith or some other person thereunto by him or her lawfully authorized."

The advice of the Supreme Court was based upon its opinion that, under the adjudications in this state, the promise of one person to indemnify another for becoming surety of a third is not within the statute. The cases cited in that opinion to support this view are Apgar's Administrator v. Hiler, 4 Zab. 812; Cortelyou v. Hoagland, 13 Stew. Eq. 1, and Warren v. Abbett, 36 Vroom 99. Of these, the only one of controlling authority here is that of Apgar's Admin-

istrator v. Hiler, which is a decision of this court. That decision does not sustain the broad proposition for which it was cited. This court there held merely that, between two persons who had signed the same promissory note as sureties for another signer, the oral promise of one surety to indemnify the other was valid. This promise was deemed outside of the statute, because, by signing the note, the promisor had himself become a debtor, and so his promise to indemnify was to answer for his own debt. In Cortelyou v. Hoagland several stockholders and directors of a corporation had promised to indemnify another stockholder and director for indorsing a corporate note, and Warren v. Abbett was of similar character. In the Cortelyou case the chancellor rested his decision on Apgar's Administrator v. Hiler, which, as above stated, was essentially different, and on Thompson v. Coleman, 1 South. 216, which was a promise to indemnify a constable for selling, under execution, goods claimed by an outside party, a case where the promisee had no redress except on the promise, and therefore clearly outside of the statute. If the decisions in Cortelyou v. Hoagland and Warren v. Abbett are to be supported on prior New Jersey adjudications, such support must be found in the doctrine that, where the consideration of a promise to answer for the debt, default or miscarriage of another is a substantial benefit moving to the promisor, then the statute does not apply. This rule was recognized in Kutzmeyer v. Ennis, 3 Dutcher 371, and Cowenhoven v. Howell, 7 Vroom 323. To support those decisions on this rule it must be held that the payment of a corporate debt is substantially beneficial to the stockholders or directors of the corporation, a proposition which seems to be denied in other tribunals. Browne Frauds, p. 164.

In the promise now under consideration there was no such element, and no case has been found in our reports involving the present question. We should, therefore, decide the matter on principle, or as nearly so as related adjudications will permit.

Looked at as res nova, it seems indisputable that the defendant's promise was within the statute; it was to respond to the plaintiff in case the defendant's son should make default in the obligation which he would come under to the plaintiff as soon as the plaintiff became surety for him, an obligation either to pay the debt for which the plaintiff was to be surety or to reimburse the plaintiff if he paid it. In this statement of the nature of the promise there is, I think, every element which seems necessary to bring a case within the purview of the statute. The parties, in giving and accepting the promise, contemplated (1) an obligation by a third person to the promisee; (2) that this obligation should be the foundation of the promise—i. e., that the obligation of the son to the promisee should attach simultaneously with the suretyship of the plaintiff, and thereupon should arise the obligation of the promisor for the fulfilment of the son's obligation, and (3) that the obligation of the promisor should

be collateral to that of the son—i. e., if the latter should perform his obligation, the promisor would be discharged, while if the promisor was required to perform his obligation, that of the son would not be discharged, but only shifted from the promisee to the promisor.

An examination of the cases will show that not many of them are in conflict with this view, when they are free from differentiating circumstances.

In the leading case of Thomas v. Cook, 8 Barn. & C. 728, such a circumstance appears in the fact that the promisor was himself a signer of the bond against which he promised to indemnify the promisee, and thus the promise was, in a reasonable sense, to answer for that which, as to the promisee, was the promisor's own debt. On this difference may be explained the decisions in Jones v. Letcher, 13 B. Mon. 363; Horn v. Bray, 51 Ind. 555; Barry v. Ransom, 12 N. Y. 462; Sanders v. Gillespie, 59 Id. 250; Ferrell v. Maxwell, 28 Ohio St. 383, and others, resting on the rule applied in Apgar's Administrator v. Hiler, 4 Zab. 812.

The remark of Mr. Justice Bayley, in Thomas v. Cook, that a promise to indemnify was not within either the words or the policy of the statute, has caused much of the confusion existing on this subject, but is more than counterbalanced by the observations of Lord Denman, in Green v. Cresswell, 10 Ad. & E. 453, and Chief Baron Pollock, in Cripps v. Hartnoll, 4 Best & S. 414, to the effect that a promise to indemnify may be also an undertaking to answer for the debt or default of another, and that when it is, it comes within the operation of the statute.

Another circumstance taking cases out of the simple class with which we are now concerned is that mentioned in Kutzmeyer v. Ennis, 3 Dutcher 271, 276, viz., the existence of a new consideration beneficial to the promisor, or, as it is sometimes expressed, moving to the promisor. Such cases are Smith v. Sayward, 5 Greenl. 504; Lucas v. Chamberlain, 8 B. Mon. 276; Mills v. Brown, 11 Iowa 314; Reed v. Holcomb, 31 Conn. 360; Smith v. Delaney, 64 Id. 264; Potter v. Brown, 25 Mich. 274; Comstock v. Norton, 36 Id. 277; Harrison v. Sawtel, 10 Johns. 242; Sanders v. Gillespie, 59 N. Y. 250; Tighe v. Morrison, 116 Id. 263.

Cases of still another character are sometimes cited in support of the statement that contracts to indemnify are outside of the statute, such as Cripps v. Hartnoll, 4 Best & S. 414; Reader v. Kingham, 13 C. B. (N. S.) 344; Anderson v. Spence, 72 Ind. 315; Keesling v. Frazier, 119 Id. 186; Beaman v. Russell, 20 Vt. 205. But these judgments rest on the same idea as Thompson v. Coleman, 1 So. 216, that there existed no other liability to the promisee than that of the promisor, and so, manifestly, the statute was not applicable.

On the other hand, there is sufficient judicial authority for the proposition that an undertaking to indemnify a person for becom-

ing surety for another is, in the absence of any modifying fact, a promise within the statute. Green v. Cresswell, 10 Ad. & E. 453; Simpson v. Nance, 1 Spears 4; Brown v. Adams, 1 Stew. 51; Kelsey v. Hibbs, 13 Ohio St. 340; Clement's Appeal, 52 Conn. 464; Bissig v. Britton, 59 Mo. 204; Nugent v. Wolfe, 111 Pa. St. 471; Draughan v. Bunting, 9 Ired. 10; Hurt v. Ford, 44 S. W. 228, and May v. Williams, 61 Mass. 125, were decided on this basis. In the case last mentioned, Mr. Justice Porter stated the true rules very clearly and concisely.

No doubt there are opposing cases which can not be explained on any distinguishing circumstances. Such seem to be Chapin v. Merrill, 4 Wend. 657; Jones v. Bacon, 40 N. E. 216; Dunn v. West, 5 B. Mon. 376; Vogel v. Melms, 31 Wis. 306, and Wildes v. Dudlow, L. R. 19 Eq. Cas. 198. But some of these cases merely follow Thomas v. Cook, ubi supra, without noticing the distinction which later discussion has justified, while others appear to have been induced by the injustice of a refusal to enforce a promise on the strength of which the promisee incurred his liability, rather than by a ready purpose to execute the will of the legislature.

No doubt injustice may result from the enforcement of the statutory rule, but that rule sprang from a conviction that its adoption would prevent more wrong than it would permit, and its enactment in England and, perhaps, every state in this union, indicates the generality of this assurance. Said Mr. Justice Sterrett, in Nugent v. Wolfe, ubi supra: "The object of the statute is protection against 'fraudulent practices commonly endeavored to be upheld by perjury,' and it should be enforced according to its true intent and meaning, notwithstanding cases of great hardship may result therefrom." With more detail did Chief Justice Shaw, in Nelson v. Boynton, 3 Metc. 396, say: "The object of the statute manifestly was to secure the highest and most satisfactory species of evidence in a case where a party, without apparent benefit to himself, enters into stipulations of suretyship, and where there would be a great temptation, on the part of a creditor, in danger of losing his debt by the insolvency of his debtor, to support a suit against the friends or relatives of the debtor, a father, son or brother, by means of false evidence; by exaggerating words or recommendation, encouragement to forbearance and requests for indulgence, into positive contracts."

Our conclusion is that the promise proved at the trial was insufficient to sustain the action; that the judgment for the plaintiff should be reversed, and that, in accordance with the reservation at the trial, a verdict and judgment should be entered in favor of the defendant.

For affirmance—Van Syckel. 1.

For reversal—The Chancellor, Dixon, Garrison, Collins, Garretson, Hendrickson, Bogert, Adams, Vredenburgh, Voorhees, Vroom. 11.

Accord: May v. Williams, 61 Miss. 125, 48 Am. Rep. 80; Gansey v. Orr, 173 Mo. 532, 73 S. W. 477; Easter v. White, 12 Ohio St. 219; Nugent v. Wolfe, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291; Wolverton v. Davis, 85 Va. 64, 6 S. E. 619, 17 Am. St. 56.

If a surety on an obligation, upon his promise of indemnity, procures another to become surety with him on the same instrument, the promise is not within the statute, for the indemnity promised is to secure his own default. Horn v. Bray, 51 Ind. 555, 19 Am. Rep. 742; Boyer v. Soules, 105 Mich. 31, 62 N. W. 1000; Ferrell v. Maxwell, 28 Ohio St. 383, 22 Am. Rep. 393.

Contra: Wolverton v. Davis, 85 Va. 64, 6 S. E. 619, 17 Am. St. 56.

A contract between cosureties fixing the proportion and extent of their several and correlative liability as between themselves is not within the statute. Rose v. Wollenberg, 31 Ore. 269, 44 Pac. 382, 39 L. R. A. 378, 65 Am. St. 826.

SECTION 4. CREDIT GIVEN TO THE PROMISOR

WATKINS *v.* PERKINS

1 *Lord Raymond* 224 (1697).

Per Holt, C. J.: If A promise B, being a surgeon, that if B cure D of a wound, he will see him paid; this is only a promise to pay if D does not, and therefore it ought to be in writing by the Statute of Frauds. But if A promise, in such case, that he will be B's paymaster, whatever he shall deserve, it is immediately the debt of A, and he is liable without writing.

BUCKMYR *v.* DARNALL

2 *Lord Raymond* 1085 (1704).

An action upon the case wherein the plaintiff declared that the defendant, in consideration the plaintiff, at his request locaret et deliberaret cuidam Josepho English a gelding of the plaintiff's ad equitandum et itinerandum usque ad Reading in comitatu Berks, assumpsit et promisit the plaintiff, quod the said Joseph and Charles the said gelding to the plaintiff redeliberarent, etc. Upon non assumpsit pleaded, this cause came to trial before Holt, Chief Justice, at Westminster Hall; and the counsel for the defendant insisting that the plaintiff ought to produce a note in writing of this promise, within the Statute of Frauds, 29 Car. 2, c. e., s. 4; and the Chief Justice doubting of it, a case was made of it, and ordered to be moved in court, to have the opinion of the other judges. And now it was argued this term by Sergeant Darnall for the defendant, and by Mr. Raymond for the plaintiff. And it was insisted for the defendant that this case was within the Statute of Frauds, 29 Car. 2,

c. 3, s. 4, for it was a promise to answer for the default and miscarriage of the person the horse was lent to. The very letting out and delivery of the horse to English implies a contract by English to redeliver him, and he is bound by law so to do, and consequently, the defendant is to answer for the default of another. In a case, 2 Will. & Mar., your Lordship settled this rule, that where an action will lie against the party himself, there an undertaking by J. S. is within the statute; and where no action will lie against the party himself, there it is otherwise. And therefore I agree this case, that if a man should say to another, "Do you build a house for J. S. and I will pay you," that case is not more than this, if a man should say, "Do you let J. S. have goods, and if he does not pay you I will," and this is within the statute, because an action will lie against J. S. for the money for the goods. Or, if a man should say, "Take J. S. into your service, and if he does not serve you faithfully, or if he wrongs you, I will be responsible," that is also within the statute.

To this it was answered for the plaintiff, that here the credit was wholly given to the defendant; that that rule of the sergeant's must be understood, where an action does or does not lie against the party himself on the contract, and not where an action does or does not lie against him upon collateral respects. And therefore in this case, for an actual conversion, or for refusing to redeliver the horse, English may be charged in trover or detinue; yet, he being not chargeable upon the contract, the case is not within the statute. This contract can not be said properly to be a promise to answer for the default or miscarriage of another, unless English were liable by the first contract.

Upon the first motion and arguing this case, the three judges against Powys seemed to be of opinion that this case was not within the statute, because English was not liable upon the contract; but if any action could be maintained against him, it must be for a subsequent wrong in detaining the horse, or actually converting it to his own use. And Powell, Justice, said that that rule, of what things shall be within the statute, is not confined to those cases only, where there is no remedy at all against the other, but where there is not any remedy against him on the same contract. This case is just like the case where a man says, "Send goods to such a one, and I will pay you;" that is not within the statute, for the seller does not trust the person he sends the goods to. So here the stable-keeper only trusted the defendant, and an action on the contract will not lie against English, but for a tort subsequent he may be charged in detinue, or trover and conversion, which is a collateral action.

Powys, Justice, said that there was a trust to English, for the very lending of the horse necessarily implies a trust to the person he is lent to, and consequently the defendant in this case is to answer for the default of another, and is within the statute.

Powell, Justice, agreed, that if a man should say, "Lend J. S. a

horse, and I will undertake he shall pay the hire of it," or, "Send J. S. goods, and I will undertake he shall pay you," that those cases would be within the statute; and agreed with Powys, that if any trust were given to English, then the case would be within the statute. But he and the Chief Justice and Gould held, that here was no credit given to English; and the Chief Justice agreed with him, that if there had, this promise would have been but an additional security, and within the statute. But the Chief Justice said, that if a man should say, "Let J. S. ride your horse to Reading, and I will pay you the hire," that is not within the statute, no more than if a man should say, "Deliver cloth to J. S., and I will pay you." He said also, that a bailee of an horse for hire is not bound to redeliver him at all events, but if he be robbed of him without fraud in him, he is excused. And so it was ruled in the case of Coggs v. Bernard, 2 Stra. 916.

The last day of the term the Chief Justice delivered the opinion of the court. He said that the question had been proposed at a meeting of judges, and that there had been great variety of opinions between them, because the horse was lent wholly upon the credit of the defendant; but that the judges of this court were all of opinion that the case was within the statute. The objection that was made was, that if English did not redeliver the horse, he was not chargeable in an action upon the promise, but in trover or detinue, which are founded upon the tort, and are for a matter subsequent to the agreement. But I answered that English may be charged on the bailment in detinue on the original delivery, and a detinue is the adequate remedy, and upon the delivery English is liable in detinue, and consequently this promise by the defendant is collateral, and is within the reason and the very words of the statute; and is as much so as if, where a man was indebted, J. S., in consideration that the debtee would forbear the man, should promise to pay him the debt, such a promise is void unless it be in writing. Suppose a man comes with another to a shop to buy, and the shopkeeper should say, "I will not sell him the goods unless you will undertake he shall pay me for them," such a promise is within the statute; otherwise, if a man had been the person to pay for the goods originally. So here detinue lies against English the principal; and the plaintiff having this remedy against English the principal, can not have an action against the defendant the undertaker, unless there had been a note in writing.

Accord: Matson v. Wharam, 2 T. R. 80; Anderson v. Hayman, 1 H. Bl. 120; Cox v. Peltier, 159 Ind. 355, 65 N. E. 6; Wallace v. Wortham, 25 Miss. 119, 57 Am. Dec. 197; Hodges v. Hall, 29 Vt. 209; Boston v. Farr, 148 Pa. St. 220, 23 Atl. 901; Smith v. Miller, 152 Ala. 485, 44 So. 399.

FRANK S. LUSK ET AL. *v.* BEN THROOP ET AL.[1]

189 *Ill.* 127, 59 *N. E.* 529 (1901).

This is an action of assumpsit, begun on August 4, 1898, by appellees, Ben Throop and William Pinnow, doing business under the firm name of Throop & Pinnow, against the appellants, Frank S. Lusk and D. D. Streeter, composing the firm of D. D. Streeter & Co., to recover the value of goods and supplies sold and delivered by appellees to the firm of Carlson & Olson, composed of Carl August Carlson and Andrew Olson, under an alleged agreement with the appellants, made prior to their delivery, to pay for the same. The declaration, filed on December 30, 1898, contains the usual common counts, setting forth that there is due from appellants to appellees the sum of $1,297.77. A trial was had before the court and a jury, which resulted in a judgment in favor of the appellees and against the appellants for $1,380.70. A motion for a new trial was made and overruled, and an appeal was perfected by appellants to the appellate court, where the judgment of the circuit court has been affirmed; and appellants prosecute their further appeal from such judgment of affirmance to this court.

The material facts are substantially as follows: In 1897 appellants were constructing a line of railroad for the Chicago and Northwestern Railway Company in McHenry county under the firm name of D. D. Streeter & Co. A portion of such work of construction was sublet by appellants to the firm of Carlson & Olson. The appellees, Throop & Pinnow, were at that time merchants in the village of Nunda in McHenry county, conducting a general store. The subcontractors, Carlson & Olson, applied to appellees to obtain supplies for themselves and their employés, while they were carrying on the work of constructing said railroad. The part of the road which Carlson & Olson undertook to construct was between the stations of Nunda and Ridgefield in said county. After Carlson & Olson had gone to Throop & Pinnow to obtain credit for said goods, Pinnow and Throop went to the office of D. D. Streeter & Co. and had a conversation with Frank S. Lusk, the junior member of D. D. Streeter & Co., about extending credit to Carlson & Olson. After said conversation, appellees proceeded to furnish and deliver to Carlson & Olson the supplies called for by them.

There is a conflict in the evidence as to the nature of the conversations which took place between appellees and the appellant, Lusk, in reference to furnishing goods or supplies to Carlson & Olson. Appellees claim that Lusk told them to furnish Carlson & Olson with what groceries and supplies they wanted, and they, appellants, would pay for them; but appellants claim that Lusk told appellees that, if they allowed Carlson & Olson to have the supplies

necessary for the men in their camp he, Lusk, would see that they were paid for the same out of any moneys that might be coming to Carlson & Olson for work performed by Carlson & Olson for appellants, before Carlson & Olson received any money themselves.

Mr. Justice Magruder delivered the opinion of the court.

If, before the delivery of any supplies and provisions by appellees to Carlson & Olson, the appellants promised appellees to pay for such supplies and provisions as appellees might thereafter deliver to Carlson & Olson, the undertaking of appellants was original, and not collateral, and appellants were liable on such original promise. The testimony of both of the appellees, and of another witness, tends to establish the making of such original promise by the appellants. It is true, that the testimony of the appellant, Lusk, is in direct contradiction of the testimony given by the appellees and their witness, and is to the effect that the appellants merely agreed to keep back from the money earned by Carlson & Olson in the construction of the railroad a sufficient amount to pay the bills of appellees, before Carlson & Olson should receive any money on their contract. The respective contentions of the appellees and of the appellants in regard to the nature of the agreement between them were submitted to the jury under the instructions of the court, and the jury found in favor of the appellees; that is to say, that appellants were liable as original promisors. Upon the questions of fact thus involved, the judgment of the circuit court in favor of the appellees, and the judgment of the appellate court, affirming such judgment of the circuit court, are conclusive; and the only questions which this court can review upon the present appeal are questions of law. (Henry v. Stewart, 185 Ill. 448; Hight v. Walker, 178 Id. 209; Boyce v. Tallerman, supra.)

Section 1 of the statute of frauds provides "that no action shall be brought, whereby to charge * * * the defendant upon any special promise to answer for the debt, default or miscarriage of another person, * * * unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," etc. (2 Starr & Curt. Ann. Stat.—2d ed.—p. 1990.) Appellants claim that, if they made any promise to pay for the goods which appellees might deliver to Carlson & Olson, such promise was verbal merely, and not in writing, and was, therefore, void under the statute of frauds. Undoubtedly, under the statute of frauds the promise to pay the debt of another, after the same is incurred, is void, unless made upon a consideration and reduced to writing. (Durant v. Rogers, 71 Ill. 121; Denton v. Jackson, 106 Id. 433; Laidlou v. Hatch, 75 Id. 11; Eddy v. Roberts, 17 Id. 505; Everett v. Morrison, Breese, 79.) But where goods, money or services are furnished to a third person, at the request and upon the credit of the promisor, the undertaking is clearly original, and in such case the statute of frauds does not apply. (Henry v.

O'Neil, 73 Ill. 593; Hughes v. Atkins, 41 Id. 213; Williams v. Corbet, 28 Id. 262; Blank v. Dreher, 25 Id. 331; Owens v. Stevens, 78 Id. 462; Hartley Bros. v. Varner, 88 Id. 561; Schoenfeld v. Brown, 78 Id. 487; 1 Reed on Statute of Frauds, § 84; 3 Parsons on Contracts—8th ed.—marg., p. 21; Bishop on Contracts, § 1260; Resseter v. Waterman, 151 Ill. 169.) In Resseter v. Waterman, supra, we said: "It may be said to be the settled rule that, where the agreement is original and independent, it is not within the statute; if collateral, it is." The rule is thus stated by Browne in his work on the statute of frauds (4th ed., § 195): "If, for instance, goods are sold upon the sole credit and responsibility of the defendant, though delivered to a third person, there is no liability, to which that of the defendant can be collateral, and, consequently, it does not require a memorandum in writing." The statute of frauds says that a promise to pay the debt of another must be in writing. Hence, when the promise is made, there must be an existing debt. If, for example, appellees had already delivered the supplies to Carlson & Olson, and, after such delivery, appellants had promised to pay for the same, then the promise would be to pay an existing debt due from a third person, and, hence, would come within the meaning of the statute. But, where the defendant promises the plaintiff to pay for goods, which the plaintiff may thereafter deliver to a third person, and which, at the time of the promise, have not been delivered, no debt exists from such third person to the plaintiff, and hence the promise of the defendant to pay is an original undertaking, and not merely a promise to pay the debt of another. (Williams v. Corbet, supra.)

Whether or not the promise is original or collateral, within the definitions already given, is a question to be determined by the jury from all the circumstances of the case, and under the instructions of the court. (Ruggles v. Gatton, 50 Ill. 412; Resseter v. Waterman, supra; 8 Am. & Eng. Ency. of Law—1st ed.—pp. 677-679; Geary v. O'Neil, supra; Moshier v. Kitchell, 87 Ill. 18; Browne on the Statute of Frauds, § 199; 1 Reed on Statute of Frauds, §§ 85, 89, 91; Boykin v. Dohlonde, 37 Ala. 583.) Inasmuch as the question, whether or not the promise in the present case was an original or a collateral undertaking was a question for the determination of the jury, and was submitted to the jury under proper instructions, their finding in favor of the appellees is conclusive, so far as this court is concerned. At the request of appellants, the court instructed the jury that, if they believed from the evidence that the appellants did promise to pay for the goods in question, it was for them to determine from the evidence whether or not such promise was an original or a collateral undertaking.

There was evidence showing that the appellees charged the supplies delivered on their books under the heading of "Carlson & Olson and Streeter & Co." Appellants complain that the second

instruction given by the trial court for the appellees, which had reference to these charges upon the books of appellees, was erroneous. That instruction told the jury that when a third person promises to pay for goods that are thereafter to be delivered to another person, and the credit is thereby extended to such person so promising to pay for the same, and he is held for the payment of the same by the person so furnishing such goods, then such person is liable for the goods so delivered in pursuance of such agreement, irrespective of such charge upon the books of the person so furnishing same; and the instruction further told the jury that, if they believed from the evidence that the defendant, Frank S. Lusk, promised the plaintiffs, or either of them, that the firm of D. D. Streeter & Co. would pay the plaintiffs for such goods, groceries and supplies as they might thereafter furnish to Carlson & Olson, and that the plaintiffs thereafter furnished to said Carlson & Olson the goods, groceries and supplies for which this suit is brought, and that the plaintiffs gave the credit to, and held, the defendants for the payment of the same, and intended to charge them with the same, then the defendants would be liable in this action, even though in plaintiffs' books the goods were charged to "Carlson & Olson and Streeter & Co." The fact that the goods are charged upon the seller's books to the third person, to whom they are furnished, and the fact that the bill for the goods is sent to such third person are of importance in determining whether the liability of the promisor is primary or secondary, but such facts are not themselves conclusive upon the question. Undoubtedly, where the question involved is whether the promise is original or collateral, the test is whether the credit is given to the person sought to be charged, or to some one else. (Geary v. O'Neil, supra; Schoenfeld v. Brown, supra; 1 Reed on Statute of Frauds, § 85; Browne on Statute of Frauds, §§ 197a, 198; 8 Am. & Eng. Ency. of Law, p. 679.)

If plaintiff's books show that the defendant was not originally debited there, but that the goods were charged against the person receiving them, this fact, if unexplained by other circumstances, would be strong evidence going to show that credit was given to the person receiving the goods (Boykin v. Dohlonde, supra); but it is not conclusive evidence of such fact. (1 Reed on Statute of Frauds, § 90; Ruggles v. Gatton, supra; Green v. Burton, 59 Vt. 424; Walker v. Hill, 119 Mass. 249; Boykin v. Dohlonde, supra.) In Ruggles v. Gatton, supra, we said: "And the fact that they were charged to the persons who purchased them is strong evidence that the credit was given to such persons, but is not conclusive. It might be rebutted by other evidence of a more convincing character, and this is a question for the consideration of the jury, to be determined from all the circumstances of the case." In Reed's work on the statute of frauds (Vol. 1, § 91) it is said: "Where the entries in

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the books showed a charge against the third party, but the other evidence in the case an original liability on the defendant's part, it is a question for the jury."

Moreover, such a charge to the person receiving the goods may be made for the purpose of preventing confusion, where the promisor has bought goods on his own account, as well as made a promise to pay for goods delivered to another. (1 Reed on Statute of Frauds, § 91; Hazen v. Bearden, 4 Sneed 49; Boykin v. Dohlonde, supra.) In the case at bar it appears that appellees had an account against Streeter & Co., the appellants here, for goods sold directly to them, and also an account against Lusk & Co., a firm which seems to have been composed of the same persons who composed the firm of Streeter & Co. In addition to these accounts, the appellees had an account against Streeter & Co. for goods which they furnished at the request of Streeter & Co. to Carlson & Olson. Hence, the charge upon the books to "Carlson & Olson and Streeter & Co." of the latter account may have been for the purpose of convenience and to prevent the confusion of the different accounts. The charge made against "Carlson & Olson and Streeter & Co." together may have been for the purpose of identifying that account, and to prevent it being mistaken for the account against Streeter & Co. alone. For these reasons we are of the opinion that the instruction complained of was not erroneous in telling the jury that the charge against "Carlson & Olson and Streeter & Co." was not material, if they believed from the evidence that the appellees actually gave credit to the appellants.

The instruction in question is also complained of by the appellants, upon the ground that it uses the words "intended to charge them with the same." Appellants contend that the intention of the appellees in regard to the matter was immaterial, and that, therefore, it was error to call the attention of the jury to the question of intention. We do not think that the instruction was erroneous in this regard. "It is always a question of intention, whether charging the goods to the person receiving them proves that the credit was given him." (1 Reed on Statute of Frauds, § 91; Green v. Burton, supra; Bishop on Contracts, § 1260; 3 Parsons on Contracts—8th ed.—marg., p. 21, and notes; Boykin v. Dohlonde, supra; Sandord v. Howard, 29 Ala. 691; 1 Reed on Statute of Frauds, § 96.)

Judgment affirmed.

Accord: Swift v. Pierce, 95 Mass. 136; Newton Grain Co. v. Pierce, 106 Mo. App. 200, 80 S. W. 268; Gallagher v. McBride, 66 N. J. L. 360, 49 Atl. 582; Kesler & Dodson v. Cheadle, 12 Okla. 489, 72 Pac. 367; Foster v. Persch, 68 N. Y. 400.

SECTION 5. JOINT LIABILITY WITH THE PRINCIPAL DEBTOR

JOHN GIBBS AND ANOTHER *v.* IRA BLANCHARD.

15 *Mich.* 292 (1867).

Christiancy, J.: The main question in this case is whether the promise of Gibbs (one of the defendants below) comes within the second clause of the second section of our statute of frauds, as a "special promise to answer for the debt, default, or misdoings" of Daily, the other defendant.

The declaration contains a special count upon the contract, and the common counts for goods sold and delivered. The special count sets forth that "in consideration that said plaintiff agreed to sell to the said Daily a certain horse which the plaintiff then and there had, of the value of sixty dollars (the defendants?) undertook and promised the said plaintiff to make, sign and deliver their promissory note to said plaintiff or bearer in the sum of sixty dollars for the purchase-price of said horse, which said promissory note was to be payable thereafter in six months from date." It further alleges that the plaintiff, relying upon said promise of said defendants and in consideration thereof, did sell and deliver the horse to said John Daily for the price of sixty dollars. The breach alleges the failure and refusal to make and deliver the note, as well as the refusal to pay the money.

It is clear, from the evidence, that the horse was bought for the benefit of, and delivered to, Daily, and that the plaintiff would not have sold the horse on the credit of Daily alone. But upon the question whether Daily and Gibbs were to give a joint note, or whether the latter was only to indorse the note of the former, or to become his guarantor, the evidence was conflicting.

There was evidence from which the jury might have found a joint promise, or in other words a promise by both to execute and deliver to the plaintiff a joint note for the price: and from the circumstances and subsequent acts of the parties the jury might have been authorized to find that the note was to be made payable in six months; though they might also have found that no particular time was mentioned or expressly agreed upon for which the note was to run.

The evidence tending to show that the promise was joint, or that a joint note was to be given, was substantially this: Gibbs and Daily called upon the plaintiff together, and Gibbs asked plaintiff if he wanted to sell his mare. Plaintiff said he did. Gibbs inquired the price, and being told sixty dollars, wanted to know if plaintiff would take Daily's note if he, Gibbs, would sign it and see it paid;

to this plaintiff assented. The mare not being present, and Gibbs, being anxious to get home, said Daily might go with plaintiff and see the mare, and if the mare suited him he might fetch her back with him and draw up a note and Daily might sign it, and the first time he, Gibbs, went to town he would sign it. The mare was delivered to Daily, who signed a note for it at six months, which was afterward indorsed by Gibbs on Sunday. This note was produced on the trial and tendered back to defendants.

The court charged the jury that "if it was the understanding of the parties that Daily was the purchaser, and that he should give his note to the plaintiff for the price, and that Gibbs should so sign as only to be liable as indorser, the plaintiff must fail. If, however, the understanding of the parties was, at the time, that Gibbs and Daily were the buyers of the mare, and that both were to be liable as purchasers for the purchase-price, and, accordingly, should become joint makers of a promissory note for its payment, though Daily was less relied upon by the plaintiff than Gibbs, and though, in point of fact, it was understood that the mare, when bought, should belong to Daily, the plaintiff is entitled to recover. That the principle in this class of cases is, that if the agreement be such that two persons, in the purchase of goods, do at the same time become codebtors to the seller for the price, then both are purchasers, and the case is not within the Statute of Frauds, and no memorandum in writing is necessary. But if it be such that one, at the time, becomes debtor to the seller, and the other security only for the debt, it is within the Statute of Frauds, and the undertaking of the security is void unless a memorandum of it in writing is made."

Though the question is one requiring some accuracy of discrimination, I have come to the conclusion, after a careful examination of the authorities, that the charge of the court was not only correct, but that it expresses the true rule of law applicable to the question with remarkable clearness.

No question can arise as to the sufficiency of the consideration for the undertaking of Gibbs, whether original or collateral, within or without the statute. Without his promise, the plaintiff would not have parted with his property. The consideration, therefore, is equally as good in law as a sale of the horse to him alone would have been for his sole promise to pay the price.

The plain, ordinary meaning of the language used in this clause of the statute would seem sufficiently to indicate that the class of special promises required to be in writing includes only such as are secondary or collateral to, or in aid of the undertaking or liability of some other party whose obligation, as between the promisor and promisee, is original or primary. If there be no such original or primary undertaking or liability of another party, there is nothing to which the promise in question can be secondary or collateral, and the promise is, therefore, original in its nature, and not within

the statute. In other words, the statute applied only to promises which are in the nature of guarantees for some original or primary obligations to be performed by another. This has been settled by a remarkably uniform course of decision since the passage of the statute—29 Car. 2, ch. 3, p. 4—which does not essentially differ from our own and those of most of the states of the Union. So numerous and so uniform have been the decisions upon this point, that it would savor of affectation to cite them. They will be found cited in most of the elementary treatises. See Brown on Stat. Frauds, ch. 10; Chitty on Cont., p. 442 et seq.; 2 Pars. on Cont., 4th ed., 301. And though the terms original and collateral have been criticized, yet when used, the one to mark the obligation of the principal debtor, the other that of the person who undertakes to answer for such debt, they are strictly correct, and give the true view of this clause of the statute. Mallory v. Gillett; Brown on Stat. Frauds, ch. 10, p. 192.

As a result of this principle, that one must be held originally or primarily, and the other only collaterally, or in default of the former, it follows that the statute only applies to such promises made in behalf or for the benefit of another, as would, if valid, create a distinct and several liability of the party thus promising, and not a joint liability with the party in whose behalf it is made. For if one be bound in the first instance and at all events, and the other only contingently, or on default of the first, the liability could not be joint. On the other hand, if the promise or the obligation of the two be joint, as between them, on the one side and the promise on the other, then neither is collateral to the other; and such joint promise is original as to both. Hence it has been held in England that an agreement to convert a separate into a joint debt is not within the statute, the effect being to create a new debt, in consideration of the former being extinguished. Ex parte Lane, 1 De Gex, 300; Brown on Stat. of Frauds, 193.

Where the question arises (as it has in almost all the cases), as one of the several liability of the party promising in behalf of another (as for the price of goods sold to another), the true rule undoubtedly is, that if the latter (to whom the goods are sold) be liable at all, then the promise of the former is collateral, and must be in writing; because, from the very nature of such a case, the party to whom the goods are sold, and in whose behalf the promise is made, is the principal debtor; and because it would be manifestly unreasonable to hold that both were in such cases severally liable as principals, as upon several original undertakings at the same moment. See Hetfield et al. v. Dow, 3 Dutcher 440; Dixon v. Frazee, 1 E. D. Smith, 32. And this rule applies equally when the promise is made in reference to a pre-existing liability of another, if the plaintiff in accepting the promise does not release the principal. In reference to all such cases the authorities may be said to be en-

tirely uniform. But the rule thus established as to cases where the question is one of the several liability of the party making the special promise, can, I think, have no application to the question of a joint liability upon a joint promise of the two. The only intimation to the contrary which I have seen is to be found in a dictum of Judge Catron in Matthews v. Milton, 4 Yerg. 576, a case in which no such question was involved, there being no evidence tending to show a joint promise. To say that when the party originally owing the debt, or for whom goods are purchased and to whom they are delivered, is liable at all, no other person can be held severally liable unless the promise be in writing, is merely saying that such promise is collateral, and therefore within the statute. But to say that they can not both become jointly liable upon their joint promise, not in writing, to pay such debt or the price of such goods, if the party originally owing the debt or receiving the goods be at all liable, is but another form of declaring that it is not competent for both to become original promisors, as between them and the promisee, unless both are under an equal obligation, as between themselves, for the ultimate payment of the debt. Such a proposition, it seems to me, can not be maintained either upon principle or authority. Such an objection to a joint promise seems rather to have reference to some supposed defect of consideration (a question entirely distinct from the statute) than to the promise. And, if the party promising jointly with another to whom goods are furnished, can not be bound jointly with the latter, because as between the two promisors, he, not having received the goods, is under no obligation to pay; then the same reason ought to operate with still greater force against his several promise to pay the whole price of goods received by the other. But the law in the latter case is well settled the other way.

It is very correctly remarked by Whelply, J., in Hetfield et al. v. Dow, above cited, that, "to settle the rights of promisors inter sese, to ascertain as between them who is to pay the debt ultimately, is no part of the object of the act. It by no means follows that he who by the arrangement between the promisors ultimately may be bound to pay the debt is, as to the promisee, the principal debtor. That does not concern him." This view, it seems to me, rests upon sound reasons—reasons which must naturally enter into the consideration of business men, in the ordinary transactions of business. Where a party has been willing to put himself in the position of an original promisor (either jointly or severally) to a vendor for goods purchased from the benefit of, or delivered to another, the vendor has a right conclusively to presume that such relations or arrangements exist between the two as to make it the duty of the party or parties promising, as between themselves, to pay according to the promise. And to allow the contrary to be shown to defeat the promise, would operate as a fraud upon the vendor.

The question of a joint promise appears to have been seldom raised for adjudication in connection with the statute of frauds; but the following cases fully sustain the proposition that a joint promise of two, whether to pay the pre-existing debt of one of them and the promisee, and valid without writing. Ex parte Lane, 1 De Gex 300; Wainwright v. Straw, 15 Vt. 215; Stone v. Walker, 13 Gray 613; and Hetfield v. Dow, 3 Dutcher 440. See also by analogy, Batson v. King, 4 H. & N. 739. The same doctrine is laid down by Mr. Brown in his able treatise on the Statute of Frauds, ch. 10, p. 197.

It is true that in Wainwright v. Straw, which most resembles the present case, the decision is placed in part upon the ground that the sale was made to both. The facts were that Straw and Cunningham both went to plaintiff's store and said they wished to buy a stove for Straw, but that both would be responsible. Now I can see no difference in legal effect between the case where A and B say to a merchant, "We want to buy a stove for B, and both of us will be responsible;" and the case where A says, "B wishes to purchase a stove, but we will both be responsible." Substantially, the transaction is the same; in both cases alike it is a sale for the benefit of the one on the joint credit of the two, and the real question in both cases is, whether the credit was given to both jointly. I do not think the court, in Wainwright v. Straw, based their decision upon the narrow and merely verbal ground of the use of the first person plural, showing merely who wanted the stove, but upon the broad ground above stated, that it was sold upon their joint credit. And in all such cases where the sale is upon the joint credit and promise of the defendants, though the property is purchased for, and is delivered to, but one of them, I think the legal effect of the transaction constitutes, as between them and the vendor, a sale to the two jointly. The sale as between the vendor and the vendee, is to the party or parties to whom the credit is given for the price, without reference to the question for whose use it is purchased, or whom, as between the promisors, is to be its owner when bought.

This brings us to another point in the case. The sale (if upon the joint credit and promise of the defendants) was a joint sale to both, as between them and the plaintiff. But in the special count of the declaration it is alleged as a sale to Daily alone. The plaintiff can not therefore recover upon the special count.

But upon the count for goods sold and delivered, the sale having been made to both, the plaintiff would be entitled to recover, if the facts be such as would warrant a recovery upon a sale made for the joint benefit of, and the property delivered to, both.

I think there was no error in the charge or proceedings of the court below, and that the judgment should be affirmed, with costs.

Cooley, J., and Campbell, J., concurred.

Accord: Boyce v. Murphy, 91 Ind. 1, 46 Am. Rep. 567; Hetfield v. Dow, 27 N. J. L. 440.
Contra: Matthews v. Milton, 4 Yerg. (Tenn.) 576, 26 Am. Dec. 247.

SECTION 6. DISCHARGE OF THE ORIGINAL DEBTOR

EZRA B. BOOTH, RESPONDENT, *v.* JEREMIAH EIGHMIE, APPELLANT

60 *N. Y.* 238, 19 *Am. Rep.* 171 (1875).

This was an action to foreclose defendant's equity of redemption in certain railroad bonds alleged to have been pledged by defendant for the sale thereof, and for judgment against defendant for any deficiency.

The court found the following facts in substance:

In January, 1869, plaintiff held a deed of certain real estate executed to him by one Mrs. Collins, which, although absolute on its face, was intended as security for a debt of about $9,000. An agreement was entered into between the parties by which plaintiff agreed to, and did, convey the lands to Mrs. Collins upon the defendant depositing with him certain first mortgage bonds of the Dutchess and Columbia Railroad Company, amounting at par to about the amount of the debt, and upon defendant's agreeing to redeem said bonds at par within one year. Defendant failed to redeem the bonds as agreed.

The court held that plaintiff was entitled to the relief demanded in the complaint, i. e., a sale of the bonds and a judgment against defendant for any deficiency. Judgment was entered accordingly.

Miller, J.: By the Statute of Frauds, any promise to answer for the debt, default or miscarriage of another is void, unless the same be in writing and subscribed by the party to be charged therewith. (2 R. S. 136, p. 2.)

One Mrs. Collins was a debtor to the plaintiff, the debt being secured by a deed of certain real estate absolute upon its face, but actually intended as a mortgage. Mrs. Collins being desirous of paying said indebtedness, and obtaining a conveyance of the land, at the request of the defendant, the plaintiff conveyed the land to Mrs. Collins, in consideration of which the defendant deposited and delivered, in pledge to secure the indebtedness, certain railroad bonds, which he agreed, within one year thereafter, to redeem at par, by paying the principal and interest which they represented.

The question to be determined is whether the promise of the defendant was void by the Statute of Frauds. The authorities upon the subject are numerous, but the later decisions have, to a great extent, established certain general rules which are in most cases

applicable and controlling. The tests to be applied under the statute in every case, is whether the party sought to be charged is the principal debtor primarily liable, or whether he is only liable in case of the default of a third person; in other words, whether he is the debtor or whether his relation to the creditor is that of surety to him for the performance, by some other person, of the obligation of the latter to the creditor. (Brown v. Weber, 38 N. Y. 187.) There is, I think, no sufficient ground for claiming that the promise of the defendant was given or accepted as collateral to the demand which the plaintiff held against Mrs. Collins, or in default of her paying the same. There was no such condition made in the agreement, and it is not to be inferred from the facts presented. It was not a promise to become liable as surety for the debt of another, or collateral to the original indebtedness. That indebtedness had been fully discharged by the conveyance of the land by the plaintiff to Mrs. Collins, and it is in no way apparent, nor can it be properly assumed that the plaintiff could enforce his claim against her. The test is, whether the plaintiff could have maintained an action against her for the demand which was paid by a conveyance of the land and acceptance of the bonds. No such element entered into the agreement, either upon the execution of the conveyance or the delivery of the bonds; nor is it to be presumed from the circumstances surrounding the case. An action brought for such a purpose would be without any evidence to support it, and must inevitably fail. The plaintiff had entirely relinquished his claim upon the land, as well as against the original debtor, and the defendant entered into an independent obligation to secure or pay the debt. The case was not that of a creditor who releases a security without extinguishing the debt, but was a relinquishment of the debt against the debtor without having and without reserving any right whatever to pursue a remedy against the debtor.

In my opinion, there is no valid ground for claiming that there was no sufficient consideration to support the promise. By the conveyance of the lands to Mrs. Collins the plaintiff gave up a security on real estate which, we are authorized to assume, was ample, and took defendant's promise with the bonds, the market value of which was fifteen per cent. below par. He also released the debtor from personal liability, and, without the benefit of the defendant's promise, he no doubt would have been subjected to loss upon the sale of the bonds. Here was an injury to follow by reason of a failure to fulfil the promise, and the defendant also was benefited by obtaining a lien upon the lands conveyed to Mrs. Collins, by means of security taken, and a mortgage which she executed to him, as well as by a right to develop these lands. (2 Parsons on Con. (5th ed.), 7.)

The case of Mallory v. Gillett (21 N. Y. 412), is cited by the counsel on both sides, and I do not discover any doctrine laid down, or principle asserted, which conflicts with the rules already referred

to as bearing upon cases of this character. In that case the plaintiff had possession of a canal boat, upon which he had a lien for repairs, and delivered it to a third person, at the defendant's request, upon his verbal promise that he would pay the amount due for such repairs, and it was held, there being no consideration moving to the defendant, that his promise was void under the statute of frauds. There is a marked distinction between the case cited and the one at bar. In the case cited, the plaintiff never relinquished or extinguished his claim against the original owner for the repairs, while here it was completely surrendered. Besides, there was no valid consideration for the promise, and it was collateral to the original debt, which was still in force, and for the collection of which there was an adequate and ample remedy. It is said, in the prevailing opinion in this case, that among the cases which are not held to be within the statute, are those "where the original debt becomes extinguished, and the creditor has only the new promise to rely upon." The case at bar may, I think, be considered as embraced within this rule, as we have seen that the plaintiff could only rely upon the agreement made with the defendant to obtain payment of her entire demand.

The judgment must be affirmed with costs.

All concur, except Allen and Folger, JJ., dissenting; Church, Ch. J., not sitting.

Judgment affirmed.

Accord: Lakeman v. Mountstephen, L. R. 7 H. L. 17; Goodman v. Chase, 1 Barn. & Ald. 297; Carlisle, Jones & Co. v. Campbell, 76 Ala. 247; Whittemore v. Wentworth, 76 Maine 20; Andre v. Bodman, 13 Md. 241, 71 Am. Dec. 628; Harris v. Jones, 140 Ga. 768, 79 S. E. 841; Sheppard v. Newton, 139 N. Car. 533, 52 S. E. 143.

The verbal promise of A to pay the debt of B, if C will discontinue a suit for its recovery, then pending against B, and a discontinuance of the suit in consideration of that promise, will not sustain a recovery by C against A. Duffy v. Wunsch, 42 N. Y. 243, 1 Am. Rep. 514; Fish v. Hutchinson, 2 Wils. (Eng.) 94.

SECTION 7. CONSIDERATION BENEFICIAL TO THE PROMISOR

WILLIAMS *v.* LEPER

3 *Burr.* 1806 (1766).

One Taylor, a tenant to the plaintiff, being three-quarters of a year (which amounted to £45) in arrear for rent, and insolvent, conveyed all his effects for the benefit of his creditors. They employed Leper, the defendant, as a broker, to sell the effects; and, accordingly, he advertised a sale. On the morning advertised for the sale, Williams, the landlord, came to distrain the goods in the

house. Leper, having notice of the plaintiff's intention to distrain them, promised to pay the said arrear of rent if he would desist from distraining; and he did thereupon desist.

At the trial a verdict was found for the plaintiff for £45.

The question was whether the verdict should be entered up for £45 or for a smaller sum (£7 5s.), the promise not having been reduced to writing.

LORD MANSFIELD: The evidence went further than the declaration states. The declaration does not state whether the promise was in writing or not; the evidence shows it was not. But both are consistent.

This case has nothing to do with the statute of frauds.

The res gesta would entitle the plaintiff to his action against the defendant.

The landlord had a legal pledge. He enters, to distrain; he has the pledge in his custody. The defendant agrees "That the goods shall be sold, and the plaintiff paid in the first place." The goods are the fund; the question is not between Taylor and the plaintiff. The plaintiff had a lien upon the goods. Leper was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien. This has nothing to do with the statute of frauds. It is rather a fraud in the defendant, to detain the £45 from the plaintiff, who has an original lien upon the goods.

MR. JUSTICE WILMOT thought this case out of the statute of frauds. This is not a collateral promise to pay the debt of another.

The case of Reid v. Nash does not clash with the other determination on the statute of frauds. That was the original undertaking; the debtor was never liable for that particular sum of £50.

But this case is not within the spirit or meaning of the act. The tenant was here the original debtor. The plaintiff had two remedies against him. The defendant made a bill of sale of goods liable to the plaintiff's distress. The plaintiff is in possession of the goods, having entered with intent to distrain them. Leper was the agent for the creditors. He makes this promise, in order to discharge the goods of this distress. I consider this distress as being actually made. Leper says, "if you will quit the goods and disencumber the fund, I will pay you."

Leper became the bailiff of the landlord; and when he had sold the goods, the money was the landlord's (as far as £45) in his own bailiff's hands. Therefore an action would have lain against Leper for money had and received to the plaintiff's use.

MR. JUSTICE YATES: It was not necessary to state in the declaration "That the promise was in writing."

This declaration states a promise "to pay the arrear of rent amounting to £45" (a specific sum). The defendant was in possession of the goods, and about to sell them. The plaintiff entered, with intent to distrain them for £45. The defendant says, "Let me

go on to sell them, and I will pay you the £45." He undertook to pay this, in all events, peremptorily and absolutely. This is an original consideration to the defendant.

Therefore he concurred in being of opinion for the plaintiff, and that the verdict should be entered for the sum of £45.

Mr. Justice Ashton: If this was a promise to pay the debt of Taylor, I should think it within the statute, upon Sir Fletcher Norton's distinctions, which are the true ones.

But I look upon the goods here to be the debtor; and I think that Leper was not bound to pay the landlord more than the goods sold for, in case they had not sold for £45.

The goods were a fund between both, and on that foot I concur.

But otherwise I should have thought (with Sir Fletcher) "That the case of Reid v. Nash does not clash with the other determinations about collateral promises."

Postea to be delivered to the plaintiff, and the verdict to stand for the whole £45.

See also Castling v. Aubert, 2 East 325; Houlditch v. Milne, 3 Esp. 86; Walker v. Taylor, 6 C. & P. 752; Edwards v. Kelly, 6 M. & S. 204; Fitzgerald v. Dressler, 7 C. B. (N. S.) 374; Harburg India Rubber Comb. Co. v. Martin (1902), 1 K. B. 778; Prime v. Koehler, 77 N. Y. 91; Westmoreland v. Porter, 75 Ala. 452.

MAULE *v.* BUCKNELL ET AL.

50 *Pa. St.* 39 (1865).

The opinion of the court was delivered by Strong, J.

Besides the common counts, to support which no evidence was given, the declaration in this case contained four, based upon a special contract. They aver, in substance, that the plaintiff and three others named, were respectively stockholders and directors of the Eastern Market Company; that the company was largely in debt for arrears of ground rent, for interest of mortgages upon their real estate, and for sums due to other creditors, among which was a debt due the plaintiff of $50,000, that, in consideration that the plaintiff and his three costockholders and directors would transfer to the defendants a portion of the stock held by each of them (the amount to be transferred being two hundred and thirty shares in all), and resign their offices as directors, that thereupon and thereby the defendants might become directors of said company and obtain control of its affairs, the defendants promised the plaintiff and his three costockholders and directors named, to pay of the said arrears of ground rent, the interest on the mortgages, and the other debts due by the company. These special counts then aver that the plaintiff and his three costockholders and directors, relying upon the said promise of

the defendants, did transfer to them the shares of stock agreed to be transferred, and resigned their offices as directors, whereupon and whereby the defendants became directors of the company, but that they neglected to pay the debt of $50,000 due from the company to the plaintiff, and neglected to pay the judgments against the company, and its other liabilities, in consequence of which the property of the company was forced to sale, the debt due to the plaintiff was not paid, and his stock was rendered valueless. It was for the breach of the contract thus set out that the action was brought.

When the case came to trial, the plaintiff, in order to sustain his declaration, offered to prove by the testimony of a witness the main facts averred, to wit, the contract as set out; the condition of the company, its resources and debts; that the plaintiff was one of its stockholders and creditors; that he and his three costockholders named had each transferred to the defendant fifty shares of their stock and resigned their office as directors; that the defendants had thereupon became directors and obtained control of the affairs of the company; and that they had paid the arrears of ground rent and interest, with two other debts of the company, but that they then refused further to perform their contract. To this offer the defendants objected, and it was overruled by the court. We have, therefore, to consider whether the court was right in refusing to permit the witness to testify to these facts.

Three reasons have been assigned during the argument in support of the rejection of the proffered evidence, either of which, if well founded, is sufficient to justify the action of the court. The first is, that the contract declared on was joint; that the alleged promise was to the plaintiff and three other persons as one party; and that the interests involved were also joint. If this be so, an action by one of the promisees alone can not be maintained, and the testimony of the witness, even if received, could have availed the plaintiff nothing.

The second reason adduced for rejecting the plaintiff's offer is, that the contract was against public policy, and therefore void, so far as it is executory. And the third is, that the contract is within the statute of frauds, being an engagement to answer for the debt or default of another, and not being in writing. We do not propose now to consider all these grounds of objection to the offer made by the plaintiff. To do so would be a work of superfluity, for we are of opinion that the statute of frauds is an insuperable obstacle in the plaintiff's way. His offer was to prove a verbal contract, which the law declares of no force.

It must be admitted that the cases respecting the application of the statute of frauds are greatly confused and irreconcilable with each other. Upon no subject, perhaps, has there been more diversity of judicial decision. The value of the statute is everywhere admitted, and its language is plain, but in the supposed justice of a

particular case, a court has often lost sight of the exact rule prescribed by the legislature. As much ingenuity has been expended in efforts to take individual cases out of the statute as was formerly devoted to avoiding the statute of limitations, and in these ingenious efforts principles have been asserted which, if sound, practically deny all effect to the expressed will of the legislature. Happily, there are glimmerings of late of a tendency to return to a plainer reading of the act, and to give to it a construction more consonant to the apparent mind of the legislature. In this state we have very few decisions upon the subject, for our statute has been in existence only since 1855, but as it is a substantial copy of the British statute, and those of other states, the judgments of their courts can not be overlooked. Without attempting any extended review of them, we think certain principles may safely be considered as settled, or if not settled, sustained by reason, and the authority of the best considered adjudications. It is not true, as a general rule, that a promise to pay the debt of another is not within the statute, if it rests upon a new consideration passing from the promisee to the promisor. A new consideration for a new promise is indispensable without the statute, and if a new consideration is all that is needed to give validity to a promise to pay the debt of another, the statute amounts to nothing. Nor can it make any difference that the new consideration moves from the promisee to the promisor. The object of the statute is protection against "fraudulent practices commonly endeavored to be upheld by perjury," and to these all suits upon verbal contracts to answer for another's debt or default are equally exposed, no matter whence the consideration of the contract proceeded or to whom it passed. Indeed many of the cases hold that the question always is, "what was the promise?" not "what is the consideration?" In note (i) to Forth v. Stanton, 1 William's Saunders, 211b, it is said: "The question indeed is, 'What is the promise?' Whether it be a promise to answer for the debt, default, or miscarriage of another, for which that other remains liable, not what the consideration for that promise is, for it is plain that the nature of the consideration can not affect the terms of the promise itself unless, as in the case of Goodman v. Chase, 1 B. & A. 297, it be an extinguishment of the liability of the original party." The doctrine of this note is approved in Fitzgerald v. Dressler, 94 Eng. C. L. Rep. 885, and with some slight modifications it results very palpably from the words of the statute. In describing the class of cases in which it is required that the agreement, in order to sustain an action, shall be in writing, no reference is made to the consideration. It is the promise alone which is mentioned. Yet it can not be denied that there is a class of cases in which the consideration has been more regarded than the nature of the promise. They do not, however, rule that a promise to pay the debt of another is not within the statute merely because it is founded

upon a consideration moving for the creditor of that other to the promisor. I find no approved cases holding that. They regard the consideration as of importance only where it is either a substantial transfer of the creditor's claim to the promisor, making the transaction a purchase, or where it is a transfer to the promisor of a fund for the payment of the debt, or property or securities charged with its payment. If such funds come to him from either the debtor or the promisee, his agreement to pay the debt need not be in writing; for, as was said in Williams v. Leper, 3 Burr 1890, the promise is considered as not to pay the debt of another, but the debt of the property which has come to his hands. In all such cases the promisor may be regarded as having purchased the goods obtained by him of the faith of his promise, and his promise may be considered as an agreement to pay the price. Nelson v. Boynton, 3 Met. 296.

It is undoubtedly true that a promise to answer for the debt or default of another is not within the statute, unless it be collateral to a continued liability of the original debtor. If it be substitute, an arrangement by which the debt of the other is extinguished, as where the creditor gives up his claim on his original debtor, and accepts the new promise in lieu thereof, it need not be in writing. And as the cases referred to show, it may be unaffected by the statute, though the original debt remains, if the promisor has received a fund pledged, set apart, or held for the payment of the debt. But except in such cases, and others perhaps of a kindred nature, in which the contract shows an intention of the parties that the new promisor shall become the principal debtor, and the old debtor become but secondarily liable, the rule, it is believed, may be safely stated, that while the old debt remains, the new must be regarded as not an original undertaking, and that it is therefore within the statute. At least this may be stated as a principle generally accurate. In William's Saunders, 211e, note 1, it is said: "The question whether each particular case comes within the clause of the statute or not depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise." The doctrine of this note is supported by very many cases, and it is in harmony with the words of the statute. It is incumbent, then, upon him who would enforce a mere verbal promise of one to answer for the debt or default of another, if the original debt remains, to show that his case is one of those that are recognized as exceptional. And it will be found, after examination, that in nearly all the decisions in which it has been held that such a promise is not within the statute there was some liability of the promisor, or his property independent of his express promise, or that he has become the actual debtor, so as that between him and the original debtor the superior

liability was his. In such cases the consideration for the new promise is regarded as material. Of course I am not speaking of cases where the debt of another is referred to merely as the measure of a promisor's liability, and in which he is liable, whether that debt is paid or not. All of our own cases are in harmony with these principles. In Shoemaker v. King, 4 Wright 110, it was said by Chief Justice Lowrie that "while the old debt remains, the new contract can not be a substituted, but only a collateral one, a promise to pay another's debt, and it is forbidden by the statute as a cause of action." "Yet," said he, "we must not be understood as questioning that large class of cases where a debtor puts money or other means into the hands of another to be delivered to a particular creditor of his, and the creditor has been held to be entitled to sue." Whether the facts of that case did not bring it within one of the recognized exceptions to the rule that a promise must be regarded as merely collateral and within the statute while the old debt remains, we need not now inquire. We refer to it only as asserting the doctrine. Malone v. Keener, 8 Wright 107, was a case in which the defendants, being indebted to the plaintiff, assigned to him a note of a third party with a parol guaranty. They were the principal debtors, and the assignment and guaranty was the mode of paying their own debt. Hence it was held that the parol guaranty was primarily a promise to pay their own debt rather than the debt of another. Arnold v. Stedman, 9 Wright 186, was a case within one of the recognized exceptions. There the promisor's property was liable for the debt of another, independent of the express promise, and the defendant undertook to pay the debt of the property.

And among all the cases cited by the plaintiff in error, in which it was held that a promise to pay a debt of another was not within the statute, there are none which are inconsistent with the rule, as we have stated it, if we except Leonard v. Vredenberg, 8 Johns. 39. There it was laid down that cases are not within the statute where "The promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the new contracting parties." That this proposition is inaccurate, however, is almost universally admitted, and, as we have already remarked, it practically denies all effect to the statute. It can not be admitted for a moment in the terms in which it was expressed.

If now we revert to the facts of the case before us, there seems no reason to doubt that the promise of the defendants is within our Act of April 26, 1855. It was a promise to pay the debts of "The Eastern Market Company." It was strictly collateral to those debts, not a substituted obligation. Those debts still continued. The company remained the primary debtor, and had they paid, the defendants would have had nothing to pay either to the plaintiff or to the original debtor. The promise of the defendants was therefore in no sense a promise to pay their own debt, or a debt of their prop-

erty. It was not in relief of any property they owned or upon which they held a lien. Nor was the consideration for the promise of a nature to take the case out of the statute. It was not a placing in the hands of the defendants, by the debtor or the creditor, funds, securities or property of the debtor pledged or devoted to the payment of the debts. The transfer of the small number of shares of stock, and the resignation by the plaintiffs of their directorship, were to enable the defendants to become directors, not to place funds in their hands to pay the debts. The averment is that it was their own money they promised to pay in discharge of the debts, and it is because they did not pay their own money that this action is brought.

If, then, it were true that the plaintiff could sue alone, and that there was no illegality in the alleged contract, which we now neither affirm nor deny, the promise is not enforceable in consequence of the statute of frauds, and for that reason the offer of evidence was properly overruled.

Judgment affirmed.

In Furbish v. Goodnow, 98 Mass. 296, 298, it is said: "When the original debtor remains liable, yet if the creditor, in consideration of the new promise, releases some interest or advantage relating to or affecting the original debt, and enuring to the benefit of the new promisor, his promise is considered as a promise to answer for his own debt, and the case is not within the statute. But if no consideration moves from the creditor to the new promisor, and the original debtor still remains liable for the debt, the fact that the promisee gives up something to the debtor, or that a transfer of property is made or other consideration moves from that debtor to the new promisor to induce the latter to make the new promise, does not make this promise the less a promise to answer for the debt of another; but, on the contrary, the fact that the only new consideration either enures to the benefit of that other person, or is paid by him to the new promisor, shows that the object of the new promise is to answer for his debt."

MATTHEW WHITE, RESPONDENT, *v.* JAMES RINTOUL, APPELLANT

108 *N. Y.* 222, 15 *N. E.* 318 (1888).

This action was brought upon an alleged verbal promise of defendant to pay the amount of two notes owned by plaintiff and made by the firm of Wheatcroft & Rintoul.

The material facts are stated in the opinion.

FINCH, J.: The doctrine prevailing in this state which serves to distinguish between original and collateral promises in cases arising under the statute of frauds has been reached in three stages. Each was a definite and deliberate advance toward a more faithful ob-

servance of the statute, and an abandonment of efforts to narrow the just and natural range of its application. When, by some authorities, it was said that a verbal promise to pay the debt of another was always collateral and invalid if the primary debt continued to exist concurrently with the promise, a simple and easy test was furnished to determine whether the statute did or did not apply. But when that test was discarded, and it became the law that a promise to pay another's debt might be original although that debt subsisted and was in no manner extinguished, the presence of such continued liability raised a cloud of doubt and ambiguity which perhaps will never be entirely dissipated. The argument in the present case has so reached back to the foundations of the controversy, and challenged or construed what has been said and ruled, as to make both useful and necessary a study of the path which the courts of this state have followed. The plaintiff has recovered upon a verbal promise to pay the debt of another, and seeks to maintain his position in part upon the definition of an original promise framed in the old and familiar case of Leonard v. Vredenburg (8 John. 29). That definition assumed as the test of an original promise that it was founded on a new or further consideration of benefit or harm moving between the promisor and promisee. There was found in this some inaccuracy of expression. For since every promise must have some consideration to be valid at common law; and that necessary and inevitable consideration, wherever the debt to be paid antecedently existed, is always "new" and "further" because different from that of the primary debt; and since also such new consideration does frequently move between the newly contracting parties, giving benefit to promisor or harm to promisee; it became apparent that the terms of the definition were dangerously broad and capable of a grave misapprehension, making it almost possible to say that a promise good at common law between the new parties was good also in spite of the statute.

This difficulty was disclosed and measured, and then remedied in Mallory v. Gillett (21 N. Y. 412), by a divided court, it is true, but upon a prevailing opinion so strong in its reasoning and so clear in its analysis as to have commanded very general approval. The case was one where, in reliance on the promise made, the promisee had released to his debtor a lien which gave his debt protection. Within the language of the rule in Leonard v. Vredenburg the promise was original and not within the statute, since the consideration which supported it was "new" and "further" and passed between the newly contracting parties, and consisted in the harm to the promisee involved in the surrender of his lien. But the promise was nevertheless held to be collateral, and the earlier definition modified so as to require that the new consideration should move to the promisor and be beneficial to him. This change shut out at once from the class of original promises all those in which the consideration of the

promise was harm to the promisee, and the resultant benefit moved to the debtor instead of the promisor. The ground of the doctrine thus asserted was explained by the test then prevailing in Massachusetts, declaring the promise original where its leading and chief object is to subserve or promote some interest or purpose of the promisor himself, and upon which the respondent very much relies. (Nelson v. Boynton, 3 Metc. 396.) That this expression was understood to mean, not merely some moral or sentimental object, but to relate to a legal interest or purpose tangible by the law and a product of the consideration received from creditor or debtor is apparent from the further current of the explanation. The learned judge contrasts a case in which the consideration benefits the debtor, but in it the promisor has no personal interest or concern, with one in which the consideration is the product of some new dealing between creditor or debtor and promisor, and in which the latter has a personal interest. That is what he means by a consideration of benefit moving to the promisor, and to obtain which is the object of the promise. But the rule thus stated and explained was again narrowed and restricted. In Brown v. Weber (38 N. Y. 187) it was asserted that a promise might still be collateral even though the new consideration moved to the promisor and was beneficial to him. It was distinctly said that the existence of those facts would not in every case stamp the promise as original, but the inquiry would remain whether such promise was independent of the original debt or contingent upon it. The court added, "the test to be applied to every case is whether the party sought to be charged is the principal debtor primarily liable, or whether he is only liable in case of the default of a third person, in other words whether he is the debtor, or whether his relation to the creditor is that of surety for the performance by some other person of the obligation of the latter to the creditor."

If this statement was not needed for a determination of the case, or the generality of its language left it debatable what precise limitation or qualification was intended to be added to the rule of Mallory v. Gillett, both difficulties were removed by the recent case of Ackley v. Parmenter (98 N. Y. 425), in which Rappallo, J., states with precision and accuracy the doctrine of the court. The debt there was the debt of one Silliman, and the verbal undertakings were held to be within the statute, unless the defendant, before making the promise, had so dealt as to make Silliman's debt his own, or had incurred a duty to pay the amount owing from Silliman to the plaintiff. It was added, relatively to one possible view of the facts, that the plaintiff's undertaking was to pay out of the proceeds of the stock, and his duty to pay would not arise until he had converted the stock into money. "Consequently," it was concluded, "at the time of the alleged promise he was under no present duty to pay and the promise, though founded on a good consideration (viz.,

the adjournment of the sale), was nevertheless an undertaking to pay the debt of another."

These four cases, advancing by three distinct stages in a common direction, have ended in establishing a doctrine in the courts of this state which may be stated with approximate accuracy thus, that where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor.

The question in the present case was raised in three ways. At the first effort to prove a verbal promise to pay the debt due plaintiff the objection was made to the evidence that if any promise was to be proved it must be in writing. The objection was overruled and an exception was taken. After the conversation had been stated, which culminated in a promise, the defendant moved to strike out that part of the answer which detailed the verbal promise. That motion was denied and the defendant again excepted. At the close of the plaintiff's case there was a motion for a nonsuit upon the ground that the promise was not in writing and was, therefore, within the statute of frauds; and also upon the ground that there was no evidence that the promise was for the promisor's special benefit. The motion was denied and again an exception was taken. Finally, at the close of the evidence, the court was asked to direct a verdict for the defendant, which was refused, and the defendant excepted. I do not think that any of these exceptions were waived by the defendant's subsequent request to charge. The case went to the jury against his objection and upon a theory to which the court drove him, he had a right to claim that he was not liable, and ask a charge which might give him protection without at all waiving his position upon the law.

We are, therefore, to bring the facts of the case to the test of the rule above stated, and in doing so we are to take them from the defendant's own lips, to treat as true his representations as detailed by his adversary, and to draw from the evidence every possible inference which is favorable to the plaintiff's case. The firm of Wheatcroft & Rintoul, of which defendant was not a member, became indebted to the plaintiff in the amount of two notes; one dated June 1, 1880, and maturing September 4, 1880, and the other dated July 1, 1880, and to become due October 4, 1880. On the 16th of August, 1880, and so before the maturity of either note, the defendant requested the plaintiff to forbear any effort at their collection until June or July, 1881, promising, if the plaintiff would do so, to pay the amount of the notes. The plaintiff did forbear and now sues upon the promise. The courts have held many times that a promise upon consideration of forbearance to sue the debtor is not original, and to be valid must be in writing.

In Ackley v. Parmenter (supra), it was said, "forbearance or indulgence to the debtor, even at the request of the promisor, will not support a verbal promise by a third party to pay the debt." If there were nothing more of the case than has been thus far stated, it would be very clear that the plaintiff ought to have been non-suited. But there are further facts upon which it was found that the sole object of the defendant was to subserve some purpose of his own. I do not recognize that as either a test or a rule. "Some purpose" might mean one of morals or sentiment, of gratitude or pride, and to subserve such purpose might be the sole object of the promise, and then by submitting the question to the jury it would be easy in every case to defeat and evade the statute. But neither the court below nor the plaintiff's counsel meant so loose a doctrine. What they did mean was that on the facts it was possible to say that the forbearance of the plaintiff to sue was not merely a benefit to Wheatcroft & Rintoul, but that defendant was so situated relatively to that firm that the plaintiff's delay was a benefit to the defendant personally, which he contracted for in his own interest, and obtained by means of his promise.

One member of the debtor firm was the defendant's son, and that firm was somewhat in debt and not managing the business successfully or satisfactorily. The defendant was a creditor of the firm. He had loaned to them something over $5,000, for which he held as a security a chattel mortgage on the fixtures and machinery of the firm. He was, therefore, to some extent, at least, a secured creditor. He represented to plaintiff that he had advanced all the money for the business of the firm; that he was determined to get rid of his son's partner, who was drawing money that was his money; that the business was not paying and he wanted to give it up or he was going to conduct it alone or through his son; that if plaintiff tried to collect his debt he would not be able to get anything; that there was a chattel mortgage against the property; that he had furnished money himself for which he had a mortgage or would get one and plaintiff could not get anything; that the only way and the best way would be to give the firm time; that it was late in the season and by waiting until the next summer they could sell their beer and that he would pay plaintiff for the two notes. That is plaintiff's account of the conversation given on his direct examination. On his cross-examination he added that defendant said he had a claim or a confession or a mortgage or some security for the amount of money due him and that plaintiff could not get anything anyway; and that the money that was due defendant was the first to be paid out of the firm. Upon the basis of this evidence the plaintiff contends that the defendant had a direct personal interest in procuring a forbearance to sue the firm which he explains in his brief by saying, "that if the plaintiff pressed the collection of the notes, and did not wait till the then next summer defendant would lose his money" which

had been loaned to the firm. But I do not discover a single fact in the case which tends to any such conclusion. I have not overlooked the proof that the plaintiff, while saying nothing of the sort in his first detail of defendant's words, did later add that defendant declared he would lose his money if plaintiff forced a collection. But this was merely an expression of an opinion or fear, not only without anything to justify it, but in direct contradiction of every fact bearing upon the situation, and indicating defendant's relations with the firm. It was a fear without a foundation; a state of mind and not a result of existing facts seen in their legal bearing. The defendant was a secured creditor of the firm. Delay on the part of plaintiff is not shown to have been of the slightest consequence to the interest of defendant. It is not pretended that his security was inadequate. Beyond that he asserted that he was to be first paid, and that plaintiff could get nothing if he sued. When the conversation took place the first note had not matured and could not be sued under about a fortnight. It is not suggested or shown that defendant's claim was not due, and there was ample time if further security was needed to sue and levy in advance of plaintiff. That delay by the latter was in the slightest degree material to the safety of defendant's debts is a purely gratuitous assumption. The evidence is all to the exact contrary. The motive disclosed was regard for his son and desire that his business credit should not be damaged by a failure. The purpose for which he sought delay was wholly in the interest of that son, and to enable him to market his beer the next summer and so procure the means to pay the plaintiff without sacrifice or discredit. The debt of the firm was in no sense defendant's debt. No consideration of benefit moved to him from either party, and least of all had there been any new dealing with either which put upon him a duty of payment. Before the promise was made he owed no such duty and came under no such obligation. The doctrine of this court clearly stamps the promise as collateral and void for want of a writing. Indeed, the proof shows that the plaintiff himself did not mistake its character. On the 1st of September, 1880, he says defendant called to get his signature to a paper which recited the ownership by defendant of a chattel mortgage on property of Wheatcroft & Rintoul, and although he signed it he testified, "my remark that I did not want to sign the paper was caused by my surprise that the man should ask me to sign that paper when he had just guaranteed my debt." Wheatcroft was present at that interview and called as a witness for plaintiff, and testified that he thought defendant said to plaintiff: "I have already promised to see you paid," and added that the words were distinctly impressed upon his memory. John Flintoff was also present at that conversation and was called by plaintiff, relating its language thus: "But, said Mr. White, you said you would see me paid, and Mr. Rantoul assented to the proposition; he said, for the matter of that I said I will see

you paid." So that not only do no facts appear which make defendant's safety depend upon plaintiff's forbearance, but the very promise itself by the plaintiff's own admission and the recital of his witnesses was a guaranty of the firm's debt and contingent upon nonpayment by them. The case is one in which a faithful observance of the statute of frauds requires us to say that the promise sued on is void for want of a writing.

The judgment should be reversed, and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

See also Fullam v. Adams, 37 Vt. 391; Davis v. Patrick, 141 U. S. 479, 35 L. ed. 826; Nelson v. Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; Patton v. Mills, 21 Kans. 163; Crawford v. Edison, 45 Ohio St. 239, 13 N. E. 80; Davies v. Carey, 72 Wash. 537, 130 Pac. 1137; Frohardt Bros. v. Duff, 156 Iowa 144, 135 N. W. 609, 40 L. R. A. (N. S.) 242n, Ann. Cas. 1915B, 254.

Cases following the very liberal rule announced in Leonard v. Vredensburg are: Lookout Mt. R. Co. v. Houston, 85 Tenn. 224, 2 S. W. 36; Ellis & Co. v. Carroll, 68 S. Car. 376, 47 S. E. 679, 102 Am. St. 679; Gale v. Harp, 64 Ark. 462, 43 S. W. 144; Swayne v. Hill, 59 Nebr. 652, 81 N. W. 855.

In Kinsley v. Balcome, 4 Barb. (N. Y.) 131, Sill, Judge, says: "In the course of this examination I have seen it repeatedly laid down as the rule, that 'when the promise arises out of some new and original consideration of benefit or harm moving between the newly contracting parties,' the promise is not within the statute. Without some qualification this is not the rule. If this were literally so, the statute would be nullified; for, as has been shown before, a promise would be always binding when there is a good consideration for it. Whenever I have met this dictum (for such only I conceive it), I have examined every authority cited in support of it, but do not find it sustained. The true rule is that the new 'original consideration' spoken of must be such as to shift the actual indebtedness to the new promisor. So that as between him and the original debtor he must be bound to pay the debt as his own the latter standing to him in the relation of surety."

SECTION 8. PROMISE TO PAY OUT OF PROPERTY IN PROMISOR'S HANDS

THE FIRST NATIONAL BANK OF SING SING, RESPONDENT, *v.* THOMAS H. CHALMERS ET AL., APPELLANTS

144 *N. Y.* 432, 39 *N. E.* 331 (1895).

This action was brought upon an alleged agreement made by defendants for a valuable consideration to pay to plaintiff the amount of an indebtedness of the firm of Charles Spruce & Co. to it.

On October 30, 1882, said firm, being financially embarrassed, confessed judgment to defendants for various sums due them and for

amounts owing to other parties. The statement on which the judgment was entered, under the head of "Liabilities assumed," set forth, among other items, the following: "Money due by Charles Spruce & Co. to First National Bank of Sing Sing on overdrawn account, $1,556.47."

The court found that defendant made an absolute, unconditional promise to pay plaintiff's debt.

Further facts are stated in the opinion.

Finch, J.: What constitutes an original promise, upon which the statute of frauds does not operate, and which, therefore, may be valid and effectual without a writing, is fairly settled in one direction at least. Wherever the facts show that the debtor has transferred or delivered to the promisor, for his own use and benefit, money or property in consideration of the latter's agreement to assume and pay the outstanding debt, and he, thereupon, has promised the creditor to pay, that promise is original, upon the ground that by the acceptance of the fund or property under an agreement to assume and pay the debt the promisor has made that debt his own, has become primarily liable for its discharge, and has assumed an independent duty of payment irrespective of the liability of the principal debtor. (Ackley v. Parmenter, 98 N. Y. 425; White v. Rintoul, 108 id. 223.) In such a case the debt has become that of the new party promising; his promise is not to pay the debt of another, but his own; as between him and the primary debtor the latter has become practically a surety entitled to require the payment to be made by his transferee. The consideration of the primary debt, by the transfer of the money or property into which that consideration had been in effect merged, may be said to have been shifted over to the new promisor, who thereby comes under a duty of payment as obvious as if such original consideration had passed directly to him.

The question before us, therefore, is whether the promise of the defendants, made to the bank, to pay the debt due it from Leary and Spruce, was founded upon such a transfer of property as I have above described, and thus was original, or whether it was not so founded and must for that reason be deemed collateral.

We are bound to assume upon the findings that the promise to pay was absolute, and clean of condition or contingency. The question whether it was made at all was severely litigated, and depended upon the conclusion to be drawn from testimony full of violent contradictions; and we are not at liberty to review the determination of fact which affirms that the promise to pay was in truth made, and was absolute in its terms as sworn to by the witnesses on the part of the plaintiff. As to the substance of the agreement between the defendants and the primary debtors there is also contradiction. The former assert that their assumption of the debt went no further than a consent to pay it out of the proceeds of the debtor's property after the discharge of their own debt; or, in other

words, that their agreed liability was to pay plaintiff only out of proceeds when realized, and even then out of any possible excess remaining over and above their own debt. If that is true they were under no present duty to pay the bank when the promise was made; the debt had not become theirs; might never become theirs; and so their verbal promise to the bank was purely collateral and to answer for the debt of another. That proposition was quite distinctly held in Ackley v. Parmenter (supra) and upon the authority of Belknap v. Bender (75 N. Y. 446), which disclosed an agreement simply to pay out of proceeds when realized, and so far as sufficient. On this branch of the case the inquiry turns upon the facts, and the findings fail to disclose any such agreement, but establish the contrary. They determine that for a valuable consideration, and by an agreement with Leary and Spruce, the defendants agreed to pay the plaintiff the debt due to it. This finding is free of any condition, and imports an absolute agreement to pay at once and in full, and so negatives the defendants' version of the facts. It is sustained by the testimony of the plaintiff's witnesses, and is strongly corroborated by the form of the confession of judgment which the defendants' attorney drew, which they accepted, upon which they issued an execution, and which provides for an assumption of the bank debt absolutely and without condition. All the requisites of an original promise, unaffected by the statute of frauds, were thus explicitly embraced in the findings, except one. It is not in terms or expressly found that the consideration, described simply as valuable, was, beyond that, such a consideration as would avoid the statute because it consisted of a transfer to the defendants for their own use and benefit of the debtors' property. That fact is involved in the findings, since it is essential to the legal conclusion, which can not stand without it. We may look into the evidence, therefore, to see whether it would have sustained such a finding if it had been explicitly made, and thereupon assume the fact in support of the judgment. (Ogden v. Alexander, 140 N. Y. 356.)

I can find in the proof no express agreement in words transferring the real and personal estate of the firm to the defendants, but that there was such a transfer in fact is abundantly established and beyond any reasonable doubt. The situation appears to have been this: Leary and Spruce were manufacturers of files. The defendants in New York were the regular purchasers, at established rates, of their whole product. The manufacturers became seriously indebted to their vendees in the progress of the business, and, as security therefor had given to them a mortgage on their real estate for $2,500, dated in 1876, and payable in one year; a second mortgage on the same land for $5,000, dated in April, 1882, and payable in one year; and, as collateral to the last-named security, a chattel mortgage for $5,000 covering all the machinery and personal property used in the manufacture of files. The stock on hand and the

equity of the mortgagors still remained to them. There was due, or to become due, on these securities about the sum of $7,400 at the date of the final arrangement of October, 1882, assuming that all the debt created prior to these dates was protected by the mortgages. But an added indebtedness, not covered by the securities, had later accrued in the form of two notes and one indorsement, amounting to about $4,200, no part of which had matured on October 30, 1882. On that day the debtors announced to the defendants their inability to pay. Of course the statement created alarm. None of the mortgages secured future advances, and the defendants found themselves unsecured creditors to the amount of over $4,000. The chattel mortgage was not due and contained no danger clause permitting an immediate seizure. The whole stock on hand, manufactured and unmanufactured, was incumbered by no lien, and that and the equity under the mortgages belonged to the debtors, was open to attack, and could be disposed of by the firm. They estimated the entire value of their property at $16,000, which was the footing of their last preceding inventory, and claimed it to be sufficient, not only to pay the defendants in full, but also the bank and certain other creditors whom they wished to protect. They were talking of an assignment, but assured the defendants that they were ready to give them a bill of sale of all their property, or any other security, provided that the bank and other named creditors were protected. The defendants agreed to assume and pay those debts, and chose instead of a bill of sale to take a confession of judgment. In that the debtors swore that they were justly indebted to the defendants in a sum made up of the total debt to the latter, and of the debts to other named creditors, which the defendants had assumed and agreed to pay. Had the transaction stopped at this point it would be difficult to support the promise to the bank, unless upon the ground of an intended purchase by the defendants of the debtor's assets, the price of which was secured by the confession of judgment. But it did not stop there. The defendants could at once have levied upon the whole personal property, and advertised a sale of the real estate, but all that was needless, because the debtors at once turned over the whole property of the defendants, and put them in entire and complete possession for their own use and benefit. Leary abandoned it utterly and went away. Spruce remained as the hired servant of the defendants, working for wages which they cut down at their pleasure, obeying their orders, shipping the whole manufactured product to them in New York, drawing on them for the pay roll and treating the property in all respects as theirs. Not a vestige of it ever came back to the debtors. The latter were willing to transfer it as their offer of a bill of sale proves; they did transfer it and in the light of the confession of judgment and the promise to the bank it is impossible not to see that it was in consideration of an agreement by the defendants to pay the specified debts.

I have not failed to consider the attempted explanation of Chalmers and the argument about it of his counsel. The former sought to put himself in the attitude of a tenant under Spruce as landlord, to claim that his wages of twenty dollars a week were in part for rent, and to show that the goods were sold to him by Spruce as before the failure. But the latter, though unwillingly, controverted the theory, and Chalmers' own version of the facts does not harmonize with the explanation made. The claim that Spruce was to remain owner and work out the debts does not account for Leary's abandonment of the possession, nor Spruce's service for wages, still less for the instant assumption and payment of all expenses and exercises of complete control by the defendants. They took all the products, and if they continued to keep the accounts in the old way it was but a natural measure of convenience in order to separate the factory business from their own, and be able to ascertain its ultimate results. They took the confession of judgment as a guard and protection against other creditors, and as a defense of the transfer made to them. They issued no execution at once because they were needless to attain possession, but did issue it later when their title was threatened. That all this was done upon an understanding and agreement in accord with the facts seems to me a natural and necessary inference.

I think the promise proved and found rested not only upon a valuable consideration, but one of such character as to make the promise original and save it from the condemnation of the statute of frauds.

The judgment should be affirmed, with costs.

All concur, except Haight, J., not sitting.

Judgment affirmed.

Accord: Woodruff v. Scaife, 83 Ala. 152, 3 So. 311; Hughes v. Fisher, 10 Colo. 383, 15 Pac. 702; McIntire v. Schiffer, 31 Colo. 246, 72 Pac. 1056; Tuttle v. Armstead, 53 Conn. 175, 22 Atl. 677; Ledbetter v. McGhees, 84 Ga. 227, 10 S. E. 727; State v. Kelly, 32 Ohio St. 421; Wyman v. Smith, 2 Sanf. Sup. Ct. 331; Wait v. Wait, 28 Vt. 350; Andrews v. Smith, 2 Cr. M. & R. 627.

Contra: Emerick v. Sanders, 1 Wis. 77.

SECTION 9. PROMISE TO PAY PRE-EXISTING LIABILITY OF PROMISOR

GILBERT MILKS, RESPONDENT, *v.* CHARLES J. RICH, APPELLANT

80 *N. Y.* 269, 36 *Am. Rep.* 615 (1880).

This action was brought upon an alleged oral guaranty or promise, upon the part of defendant, at the time of the sale and transfer

by him to plaintiff, that the note was good and would be paid at maturity.

The note in question was made by C. E. Marsh, payable to the order of S. S. Marsh, and indorsed by the latter. Plaintiff's evidence was to the effect that defendant represented to him he had received the note from the Marshes for moneys advanced by him to them to purchase apples; that he stated that the note was perfectly good and would be paid at maturity, and thereupon plaintiff purchased the note. He caused it to be presented when due at the place of payment specified therein, but the same was not paid.

Earl, J.: We must assume here the most favorable construction which the evidence will bear for the plaintiff, as all conflict and doubt has been settled in his favor by the jury. We may assume, then, as the effect of the evidence (although it is not very satisfactory), that the defendant, in borrowing the money of the plaintiff and disposing of the Marsh note to him, was ostensibly acting for himself, and not as agent for Marsh, and that he promised that the note was good, and would be paid at maturity. The defendant claims that this promise, not in writing, is void under the statute of frauds. The reasoning to take this promise out of the statute is quite subtle, and I should have much difficulty in yielding it my assent but for the authorities which I think ought now to control. The following are some of them: Fowler v. Clearwater, 35 Barb. 143; Dauber v. Blackney, 38 id. 432; Lossee v. Williams, 6 Lans. 228; Johnson v. Gilbert, 4 Hill 187; Brown v. Curtiss, 2 N. Y. 225; Cardell v. McNiel, 21 id. 336; Bruce v. Burr, 67 id. 237. In Johnson v. Gilbert, the plaintiff, at the defendant's request, paid one James Sherwood, and in consideration of that payment, the defendant transferred the note of one Eastman to the plaintiff, and guaranteed the payment of the note. It was held that this guaranty was not within the statute of frauds. Judge Bronson said in that case, by way of illustration, that if A sells and delivers his horse to B, and B delivers to A the note of C for one hundred dollars, and agrees that the note shall be paid at maturity, it is an original undertaking, and not within the statute of frauds. In Dauber v. Blackney, Judge Hoyt, writing the opinion of the court, and reviewing many decisions, said: "That wherever the holder of a note against a third person turns it out in payment of his own debt, or in payment of property purchased, or for money received by him from the person to whom he transfers it, and at the same time agrees that the note is good, or will be paid at maturity, or that it will be collected by due process of law against the maker, this is an undertaking, in substance, entirely for his own benefit and advantage, and the contract is valid, although it rest entirely in parol, and is not within the statute of frauds." In Cardell v. McNiel, the defendant, making a purchase of a horse of the plaintiff, delivered to him the chattel note of a third person in part payment, and agreed by parol that the maker was good, and that the

note would be paid when due, and it was held that the agreement was not within the statute of frauds. Judge Comstock said: "In mere form it was certainly a collateral undertaking, because it was a promise that another person should perform his obligation. But, looking at the substance of the transaction, we see that the defendant paid, in this manner, a part of the price of a horse sold to himself. In a sense merely formal, he agreed to answer for the debt of Cardell. In reality he undertook to pay his own vendor so much of the price of the chattel, unless a third person should make the payment for him, and thereby discharge him." In Bruce v. Burr, defendant contracted to sell and deliver to the plaintiff a quantity of books, receiving in payment therefor of the plaintiff the promissory note of one Lund. At the time of the transaction the plaintiff orally guaranteed that Lund was responsible, and that the note would be paid at maturity. It was held that the guaranty was not within the statute of frauds.

Here the money was delivered to the defendant for his own benefit, and the Marsh note was delivered to and received by the plaintiff as a mode of paying the plaintiff for the money thus had. The defendant's promise may be regarded, in effect, not as a collateral promise to answer for the default of Marsh, but as a promise to pay the plaintiff for the money he had had, in case Marsh did not pay him, like the promise of one to pay his own debt, in case a third person did not pay it. Within the principles laid down in the authorities above cited, such a promise is not within the statute.

The judgment should be affirmed, with costs.

All concur, except Rapallo, J., absent.

Judgment affirmed.

Accord: Clay Lumber Co. v. Hart's Branch Coal Co., 174 Mich. 613, 140 N. W. 912; Clopper v. Poland, 12 Nebr. 69, 10 N. W. 538; Malone v. Keener, 44 Pa. 107; Wyman v. Goodrich, 26 Wis. 21; King v. Summitt, 73 Ind. 312, 38 Am. Rep. 145.

But see Dows v. Swett, 120 Mass. 332.

When a purchaser of property agrees with the vendor to assume and pay certain debts of the vendor, the promise is not within the statute. "This rests not only upon the proposition that a promise to a debtor to pay his debt is not within the statute, but also upon the further fact that it is the promisor's own debt which he agrees to pay by extinguishing the debt of another." Wilson v. Bevans, 58 Ill. 232; Clinton Nat. Bank v. Studeman, 74 Iowa 104, 37 N. W. 112; Wear-Boogher Dry-Goods Co. v. Kelly, 84 Miss. 236, 36 So. 258; Keyes v. Allen, 65 Vt. 667, 27 Atl. 319; Skinker v. Armstrong, 86 Va. 1011, 11 S. E. 977; Green v. Hadfield, 89 Wis. 138, 61 N. W. 310; Todd v. Tobey, 29 Maine 219.

Such promise if made only to the debtor is enforceable by the creditor for whose benefit it is made. Morgan v. Overman Silver Min. Co., 37 Cal. 534; Johnson v. Knapp, 36 Iowa 616; Thompson v. Thompson, 4 Ohio St. 333; Campbell v. Smith, 71 N. Y. 26, 27 Am. Rep. 5.

SECTION 10. PROMISE OF DEL CREDERE AGENT

WOLF & HENRICKS, *v.* KOPPEL

5 *Hill (N. Y.)* 458 (1843).

Error to the New York C. P., where Koppel sued Wolff & Henricks, to recover the price of certain goods alleged to have been sold by the latter as factors acting under a del credere commission. The agreement del credere was by parol; and one point made in the court below was, that the defendants' engagement, not being in writing, was void by the statute of frauds. The court held otherwise; and, after judgment in favor of the plaintiff, the defendants sued out a writ of error.

By the court, Cowen, J.: It is objected that the contract of a factor, binding him in the terms implied by a del credere commission, is within the statute of frauds, and should therefore be in writing. Such is the opinion expressed by Theobald (Pr. and Surety, 64, 5) and in Chit. on Contr. 209, 10 Am. ed. of 1842. The question was also mooted in Gall v. Comber (1 B. Moor. 279), but not decided as seems to be implied in the careless manner in which the case is quoted by Chitty. (8 Taunt. 558, S. C.) All the authority presented on the argument grows out of the nature of the contract as held by the K. B. in Morris v. Cleasby (4 Maule & Selw. 556, 574, 5). That case certainly defines the liability of the factor somewhat differently from what several previous cases seem to have done. The effect of acting under the commission is said to be that the factor becomes a guarantor of the debts which are created; that is to say, they are debts due to the merchant, and the factor's engagement is secondary and collateral, depending on the fault of the debtors, who must first be sought out and called upon by the merchant. (See also Hornby v. Lacy, 6 Maule & Selw. 166, 171, 2; Peele v. Northcote, 7 Taunt. 484, 1 B. Moor. 178, S. C.; Leverick v. Meigs, 1 Cowen, 645, 664.) On this we have the opinion of learned writers that if the agreement del credere be made without writing, the case comes within the statute. On the other hand, approved writers assert that this is not so. (1 Beawes 46; 6th Lond. ed.; 3 Chit. Commercial Law, 220, 1.) It is true, these latter go on the more stringent obligation supposed by Lord Mansfield; that of a principal debtor on the part of the factor, the accessorial obligation lying rather on the purchaser. This view of the matter was no longer correct after the cases I have mentioned were decided. The consequence sought to be derived, however, by writers, is merely speculative; and the contrary has of late been directly held by the Supreme Court of Massachusetts, in Swan v. Nesmith (7 Pick. 220). It is said this was without the court being aware of Morris

v. Cleasby. Be that as it may, they seem to have been fully aware of the rule laid down in that case, and to have recognized it as correct. They considered the obligation as a guaranty. But a guaranty, though by parol, is not always within the statute. Perhaps, after all, it may not be strictly correct to call the contract of the factor a guaranty, in the ordinary sense of that word. The implied promise of the factor is merely that he will sell to persons in good credit at the time; and in order to charge him, negligence must be shown. He takes an additional commission, however, and adds to his obligation that he will make no sales unless to persons absolutely solvent; in legal effect, that he will be liable for the loss which his conduct may bring upon the plaintiff, without the onus of proving negligence. The merchant holds the goods, and will not part with them to the factor without this extraordinary stipulation, and a commission is paid to him for entering into it. What is this, after all, but another form of selling the goods? Its consequences are the same in substance. Instead of paying cash, the factor prefers to contract a debt or duty which obliges him to see the money paid. This debt or duty is his own, and arises from an adequate consideration. It is contingent, depending on the event of his failing to secure it through another—some future vendee, to whom the merchant is first to resort. Upon nonpayment by the vendee the debt falls absolutely on the factor. As remarked by Parker, C. J., in Swan v. Nesmith, the form of the action does not seem to be material in such case; that is to say, whether the merchant sue for goods sold, or on the special engagement. The latter is perhaps the settled form; but still the action is, in effect, to recover the factor's own debt. In the late case of Johnson v. Gilbert (4 Hill 178) the defendant, in consideration of money paid for him by the plaintiff, assigned a chattel note and guaranteed its payment. In such a case the declaration must be on the guaranty to pay the debt of another; but this is so in form merely. We held that the contract was to pay the defendant's own debt; that it was not a contract to pay as the surety of another. All such contracts and many others are, in form, to pay the debt of another, and so literally within the statute, but without its intent. A promise by A to B that the former will pay a debt due from the latter, is not within the meaning, though it is within the words. (Conkey v. Hopkins, 17 John. 113; Eastwood v. Kenyon, 11 Adolph & Ellis 438.) So are a numerous class of cases, where the promise is made in consideration of the creditor relinquishing some lien, fund or security. (Theobald Pr. and Surety, 45, and the cases there cited.) The merchant gives up his goods to be sold, and pays a premium. Is not this in truth as much and more than many of those cases require which go on the relinquishment of a security? Suppose a factory agrees by parol to sell for cash, but gives a credit. His promise is virtually that he will pay the amount of the debt he thus makes. Yet who would say his promise is within

the statute? The amount of the argument for the defendant would seem to be that, an agent for making sales, or indeed a collecting agent, can not, by parol, undertake for extraordinary diligence, because he may thus have the debt of another thrown upon him. But the answer is, that all such contracts have an immediate respect to his own duty or obligation. The debt of another comes incidentally as a measure of damages.

Judgment affirmed.

Accord: Couturier v. Hastie, 8 Exch. 40; Sutton v. Grey, [1894] 1 Q. B. D. 285; Swan v. Nesmith, 7 Pick. (Mass.) 220, 19 Am. Dec. 282; Bullowa v. Orgo, 57 N. J. E. 428, 41 Atl. 494; Sherwood v. Stone, 14 N. Y. 267.

CHAPTER III

COMMERCIAL GUARANTIES

SECTION 1. SPECIAL GUARANTY

JOHN TAYLOR ET AL. *v.* CHAS. W. WETMORE

10 *Ohio* 490 (1841).

This is an action of assumpsit.

The declaration contains two special counts. In the first, it is averred that one C. D. Farrar, on the 26th of November, 1836, being desirous of purchasing a general assortment of goods in the city of Pittsburgh, for a retail country store, on a credit, and being unknown to the business men of said city, applied to the defendants, Messrs. Wetmore, then doing business at Cuyahoga Falls, in Portage county, for a general letter of credit directed to some one or more of their correspondents in the city of Pittsburgh, by means of which the said Farrar might be enabled to make his purchase; and the said defendants upon such application made and delivered to Mr. Farrar a letter of credit, or written guaranty, addressed to Messrs. A. D. McBride & Co., merchants, in Pittsburgh, in the words following:

"CUYAHOGA FALLS, November 26, 1836.

"Messrs. A. D. McBride & Co.:

"GENTLEMEN—Mr. C. D. Farrar has concluded to purchase a few goods; we have that confidence in Mr. Farrar that we will say that we will be responsible to the amount of two thousand dollars for goods delivered to him. We are, truly,

"C. W. & S. D. WETMORE."

And which said letter, the plaintiffs aver, was taken by Mr. Farrar and presented to Messrs. McBride & Co. at Pittsburgh, who retained it as security for themselves and such other merchants in the said city as should at that time, and on the faith of said guaranty, sell goods on a credit to the said Farrar.

It is also averred that Mr. Farrar was unable to obtain a general assortment of goods from the house of the Messrs. McBrides, whose business was confined to that of grocers, and therefore he made application to the plaintiffs upon the strength of the said guaranty

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then in the hands of McBride & Co., referring the plaintiffs to the house of McBride & Co. and to the said guaranty; that the plaintiffs did, in fact, call upon McBride & Co., examined the letter of credit, and being satisfied with their statements in regard to the responsibility of the defendant and of the guaranty, in consideration thereof sold and delivered to Mr. Farrar, upon a credit of six months, a bill of dry goods amounting to seven hundred and sixty dollars and seventy-five cents; of all which the defendants had due and timely notice. The plaintiffs then aver that the credit has expired and that Farrar has omitted to pay, etc.

Wood, J.: Under the averments in the declaration, and the testimony submitted, are the plaintiffs entitled to judgment? And I may here remark, in the outset in this case, that I know of no arbitrary rule applicable to actions founded upon mercantile guaranties, which creates obligations between the parties to which they have neither expressly nor impliedly assented. In all actions founded in contract, the agreement as set forth must be proved, or the circumstances existing between the parties must be such as to leave it clearly to be inferred. In enforcing them, courts of justice, though they may sometimes be confined by technical rules, always endeavor to ascertain the understanding and intentions of the parties, and these are considered as the essence of their agreements in carrying them into execution. Mercantile guaranties are either general or special; though a single letter of credit may bear upon its face both of these distinctions. It may be general as to the whole world, to whom the bearer may be accredited, and to any portion of whom, at his own option he may make the guarantor a debtor, and special as to the amount of the credit, or unlimited or general in the amount, and special as to the parties.

The first inquiry which arises here is whether the guaranty in question is not special as to persons. It is directed to the house of McBride & Co. in the city of Pittsburgh, and nothing upon its face evincing an intention to give Farrar credit, or to incur responsibility with any other house.

The counsel for the plaintiff here admit that a surety can not be held beyond the terms of his engagement, but they insist that, although it is addressed only to McBride & Co., as it does not say we will be responsible to you, it is a letter of credit to any other who will advance the goods. It seems to us this reasoning is more ingenious than sound. The guaranty being addressed to A. D. McBride & Co., it is to them the defendants speak when they say, "We will be responsible to the amount of $2,000," and it contains no general terms by which either Farrar or the house of McBride had the authority to transfer it to the plaintiffs and they to make the defendants their guarantors, without their assent, express or implied.

Judgment for the defendants.

Accord: Taylor v. McClung, 2 Houst. (Del.) 24; Birckhead v. Brown, 5 Hill (N. Y.) 634; Evansville Nat. Bank v. Kaufman, 93 N. Y. 273, 45 Am. Rep. 204; Allison v. Rutledge, 13 Tenn. 193; Stevenson v. McLean, 11 Up Can. (C. P.) 208; King v. Batterson, 13 R. I. 117.

But see McNaughton v. Conkling, 9 Wis. 316.

Likewise a guaranty addressed to two individuals will not bind the guarantor if acted upon by only one. Smith v. Montgomery, 3 Tex. 199.

If a right of action has arisen on a special guaranty it may be assigned to a third person. Evansville Nat. Bank v. Kaufman, 93 N. Y. 273, 45 Am. Rep. 204.

SECTION 2. GENERAL GUARANTY

JOHN LOWRY ET AL. *v.* HIRAM ADAMS.

22 *Vt.* 160 (1850).

Poland, J.: From the bill of exceptions and other papers referred to in this case the following facts appear to have been proved by the plaintiffs at the trial of this cause in the county court. That E. N. Drury was the son-in-law of the defendant, and some time previous to September, 1846, had been in partnership with him in mercantile business in the city of Vergennes, and had purchased the defendant's interest in the partnership business and had succeeded him therein. That in the month of September, 1846, Drury, being about to go to the city of New York to purchase his usual supply of fall goods for his store in Vergennes, applied to the defendant for a letter of credit to enable him to purchase said goods; and the defendant, on the seventeenth day of September, 1846, gave to Drury a writing in these words, to wit: "Mr. E. N. Drury is buying goods in New York, and what he may want, more than he pays for himself, I will be responsible for; Vergennes, September 17, 1846. (Signed) Hiram Adams." That Drury carried said writing to the city of New York, and, on the twenty-second day of September, 1846, presented the same to Stearns & Johnson, and, upon the strength and credit of it, purchased of them a small bill of goods. Then Drury left said paper in the possession of Stearns & Johnson, and at the same time told them that he should buy goods of other persons in New York, and desired Stearns & Johnson to keep said paper in their possession and exhibit it to those who called on them to see it, and to hold it for the use and benefit of any person from whom he might purchase goods. That on the same day, or within a day or two after, Drury applied to the plaintiffs to sell him a bill of goods on credit, and at the same time informed them of said writing, and that he had deposited the same with Stearns & Johnson for the purposes above stated; and the plaintiffs thereupon sent their clerk to the store of Stearns & Johnson to see the writing,

and it was exhibited to the clerk by Stearns & Johnson, and a copy of it was taken by him and delivered to the plaintiffs. That the plaintiffs, being satisfied of the sufficiency of said paper, sold and delivered to Drury a bill of goods amounting to the sum of $371.38, and took his note for the amount, payable in four months from date (September 25, 1846), relying upon the said paper as their security for payment. That on the ninth day of November, 1846, the plaintiffs, upon the credit and faith of said paper, sold and delivered to Drury another bill of goods amounting to the sum of $81.90. That Drury returned with said goods to Vergennes, and continued to carry on his business there as a merchant until some time in the winter of 1847, when he failed and became insolvent, and the plaintiffs have never been paid for said goods. The plaintiffs introduced evidence tending to prove that between the sixth day of December, 1846, and the second Tuesday of the same month they gave notice to the defendant that they had sold and delivered the above mentioned bills to Drury, upon the faith of defendant's said guaranty, that the same were not paid for, and that they should look to the defendant for payment, and also proved that they gave notice to the defendant on the twenty-fifth day of January, 1847, that Drury had not paid said note. The county court ruled that the plaintiffs could not maintain their suit against the defendant upon said guaranty; whereupon the plaintiff submitted to a verdict for the defendant, with leave to except to the ruling of the court, and the question is now before us upon the correctness of that decision.

1. The defendant insists that, although the writing signed by him was not addressed to any particular person, yet that, when it had been presented by Drury to Stearns & Johnson, and they had given Drury credit upon the faith of it, its object and purpose had become complete and executed, and that thereafter the paper was to have the same legal effect and consequences as if it had been originally addressed to Stearns & Johnson by the defendant.

If the purpose of the parties were such that it might have been fulfilled by such use of the paper, or if the parties, at the time it was executed, might reasonably be supposed to have contemplated only a single purchase upon the credit of it at some one particular house, this position of the defendant is doubtless correct. It becomes important, then, to ascertain and determine, if possible, the true object and intent of the defendant in executing the paper and delivering it to Drury; for the law aims in all cases if possible to give effect to and carry on the real designs of the parties in every species of contracts; and in no one class of cases have the courts gone so far for that purpose, as in those of merchantable transactions and securities.

For the purpose of ascertaining the intent of the parties in entering into any contract, courts will look at the situation of the parties making it, the subject-matter of the contract, the motives of the

parties in entering into it, and the object to be attained by it; and, even in cases where the contract is reduced to writing, will allow all these circumstances to be shown by parol evidence, if the intent of the parties, upon the face of the contract, is doubtful, or the language used by them will admit of more than one interpretation. See French v. Carhart, 1 Comst. 96, and observations of Jewett, Ch. J., p. 102; Chit. on Cont. 74, and notes. When, from the contract itself and all the surrounding circumstances, the true object and intent of the parties has been ascertained, courts will enforce the contract according to that intent, unless there be found in the way some stubborn, inflexible rule of law, absolutely requiring a different determination.

Considering the case in this view, what was the intention and understanding of the defendant at the time he made and delivered the guaranty, or letter of credit in question, to Drury? Drury was going to New York to purchase his usual fall supply of goods for the business of a country store, where goods of every variety and description are usually kept for sale. The defendant had been a merchant himself, and had formerly carried on the mercantile business in the same store then occupied by Drury, and must have known that it would be impossible for Drury to have supplied himself with all the various kinds of goods usually kept for sale in a country store, at any single house in New York, and that he must necessarily make purchases of goods at several different houses. The defendant, having been in business and known to be responsible, under this state of things, gives to Drury a general letter of credit to carry to New York addressed to no one, in which he agrees to be responsible for the goods Drury may purchase, more than he pays for. It would seem from the writing itself, and from the situation of the parties, impossible for any one to doubt what the defendant really intended when he executed the paper and delivered it to Drury. We are fully satisfied that his object must have been, and that he intended, to give to Drury the necessary credit to enable him to purchase his fall stock of goods of the various descriptions and varieties kept in a country store, at as many different houses, and of as many dealers, as might become necessary for that purpose.

Is there, then, any imperative rule of law in the way of giving effect to this intention of the parties, and which will prevent these plaintiffs who sold goods to Drury upon the credit and faith of the defendant's letter, from holding the defendant liable, because another firm had previously trusted Drury with a bill of goods upon the credit of the same letter? No case has been shown us, and the counsel for the defendant admits that after a laborious search he had not been able to find any decided case, or statement by any elementary writer that, upon a general letter of credit, like the present one, the signer could only be liable to the person who gave the first

credit upon it. In the case of McClung et al. v. Means, 4 Ham. Ohio R. 193, the Supreme Court of Ohio seems to have held that, upon a guaranty very similar to the present, different persons might give credit upon the faith of it, though judgment in that case was given for the defendant upon another point. We do not find that this precise point has been adjudged by the courts, either in England or in this country; but in many cases we find dicta fully warranting the sustaining of such action. See McLaren v. Watson's Exr., 26 Wend. 436, 437, by Verplance, Senator; Burckhard v. Brown, 5 Hill 642. See also opinion of Judge Story, in note to Story on Bills, 545 to 555; Story on Cont., 737, and cases cited in notes; Smith's Merc. Law, 448, and Am. editor's note; Lawranson v. Mason, 3 Cranch 492; Bradley v. Cary, 3 Greenl. 233. Without taking further space upon the question, we are not able to discover any principle or authority by which we are precluded from giving to the defendant's letter of credit the effect we are satisfied he intended—that is, to make himself responsible to each and every person who should sell goods to Drury, relying upon the faith and credit of it, and that he became liable to each in the same manner, and to the same legal effect and extent as if he had given a separate letter to each. * * *

The judgment of the county court is therefore reversed and a new trial ordered.

See also Pollock v. Helm, 54 Miss. 1, 28 Am. Rep. 342; Russell v. Wiggin, 2 Story C. C. 213; Union Bank v. Coster, 3 N. Y. 203, 53 Am. Dec. 280; Watson v. McLaren, 19 Wend. (N. Y.) 557.

SECTION 3. CHANGE OF PARTIES

J. STRANGE, J. DASHWOOD, G. T. STEWARD, J. AGNEW AND W. McGEORGE, SURVIVING PARTNERS OF JAMES WALWYN, DECEASED, *v.* LEE

3 *East* 484 (1803).

In debt on bond, the plaintiffs declared as surviving partners of James Walwyn, to whom in his lifetime with themselves as bankers and partners, on the 3d of March, 1800, the defendant became bound in the sum of £999. The defendant craved oyer of the bond, which was a joint and several bond by himself and one Benjamin Blyth; and of the condition; which, reciting "that Blyth intended forthwith to open an account with Walwyn, Strange and the other plaintiffs, as his bankers, and that in the course of their dealings and transactions he might become indebted to them for money advanced on bills, bonds, notes, or other securities, or upon drafts or

notes drawn or issued by him, Blyth, upon or made payable at the banking-house of the said Walwyn, Strange, etc., and for interest and commission, etc., witnessed, that if the defendant and Blyth, and their or either of their executors, etc., should from time to time thereafter on demand pay to the said Walwyn, Strange, etc., or either of them, all and every sums of money which should or might at any time or times thereafter become due to them from Blyth for money advanced to him, or for his use, upon any bills, etc., drawn or issued by Blyth upon or made payable at the banking-house of Walwyn, Strange, etc., or for interest on the money advanced by them as aforesaid from the times of advancing the same respectively until repayment thereof, or for commission, etc., or otherwise howsoever; then the obligation to be void, etc. The defendant then pleaded (1) non est factum; (2) performance generally in the words of the condition, i. e., payment to Walwyn, Strange, etc., of all sums which became due to them from Blyth; (3) that Walwyn, Strange, etc., and the other plaintiffs, before and on the 3d of March, 1800, carried on the trade and business of bankers, as partners on their own account and in their own names only, and not in partnership with any other, and that they so continued to carry on the same till the 9th of October following, when Walwyn died. That at the death of Walwyn there was not due from Blyth to Walwyn, Strange, etc., any money for money advanced to him, or for his use, upon any bills, etc., drawn or issued by Blyth upon or made payable at the banking-house of Walwyn, Strange, etc., or for interest, etc., or commission, etc., or otherwise howsoever.

The replication joined issue on the first plea, and as to the second, protesting that Blyth had not paid to Walwyn, Strange, etc., the sums which from time to time became due to them, etc., assigned for breaches (1) that after the making of the writing obligatory, and in the lifetime of Walwyn, advanced to Blyth upon his bills, etc., payable at their banking-house, etc., in the lifetime of Walwyn, in £250 for interest and commission, etc., which sums Blyth did not on demand pay to Walwyn, Strange, etc., in the lifetime of Walwyn, or since his death, to the plaintiffs, although demanded, etc; (2) that after the making of the writing obligatory, and after the death of Walwyn, viz., on the several days between the 10th of October, 1800, and the 31st of December, 1801, the plaintiffs, survivors as aforesaid, advanced and paid to Blyth and for his use, upon divers bills and notes issued by Blyth upon and made payable at the banking-house of the plaintiffs, Strange, etc., survivors as aforesaid, £6,000; and that after there became due from Blyth on the several days, etc., between the 10th of October, 1800, and the 31st of December, 1801, to the plaintiffs Strange, etc., a further sum of £200 for the interest of money advanced by them as last aforesaid, and for commission for transacting business, etc.; which sums Blyth

did not on demand pay to the said plaintiffs. Replication as to the third plea, that at the time of Walwyn's death, there was due and owing from Blyth to Walwyn, Strange, etc., in the lifetime of Walwyn, £6,000 as well for money advanced to Blyth upon certain bills, etc., made payable at the banking-house of Walwyn, Strange, etc., as for interest thereon and commission, etc. On all these issues were taken and joined.

The cause was tried at the Sittings after Michaelmas term before Lord Ellenborough, C. J., when a verdict was found for the plaintiffs, subject to the opinion of the court on the following case.

Espinasse for the plaintiff, upon the first general question, contended that the defendant was liable upon his bond, notwithstanding the change of partners in the house, to which the security was originally given, by the death of one partner and the introduction of another. The obligation was meant to be given to the parties, not personally or individually, but as a house of trade, without regard to the particular persons who might from time to time constitute the partnership. This being the manifest intention of the parties, the court will give effect to it without looking critically to the mere words of the obligation, in which the individuals are merely named as descriptive of the banking-house; and he cited Co. Lit. s. 282; Bache v. Proctor, Dougl. 382; Teat's Case, Cro. Eliz. 7; and particularly Barclay v. Lucas (M. 24 Geo. 3 B. R., cited in Barker v. Parker, 1 Term Rep. 291), where a bond for the fidelity of a clerk, who was taken into the service of the obligees as a clerk in their shop and counting-house, was holden not to be discharged by the obligee taking another partner into their house; and that the obligees might recover from the surety on his bond money received by the clerk after such change of partners; such bond being meant only as a security to the house of the obligees.

Moore, contra, was stopped by the court.

Lord Ellenborough, C. J.: The court will no doubt construe the words of the obligation according to the intent of the parties to be collected from them; but the question is, what the intent was? The defendant's obligation is to pay all sums due to them, on account of their advances to Blyth. Now who are "them" but the persons before named, among whom is James Walwyn, who then constituted the banking-house, and with whom the defendant contracted? The words will admit of no other meaning. And indeed with respect to any intent which parties entering into contracts of this nature may be supposed to have, it may make a very material difference in the view of the obligor, as to the persons constituting the house at the time of entering into the obligation, and by whom the advances are to be made to the party for whom he is surety. For a man may very well agree to make good such advances, knowing that one of the partners, on whose prudence he relies, will not agree to advance money improvidently. The characters, therefore, of the

several partners may form a material ingredient in the judgment of the obligor upon entering into such an engagement. But with a small shade of difference in Barclay v. Lucas, where some expressions occur that may perhaps be difficult to reconcile with the other authorities, I consider this question concluded by the cases of Arlington v. Merrick, 2 Saund. 412; Wright v. Russell, 2 Black. 934, and 3 Wills. 532, and Barker v. Parker (Term Rep. 287). It may be observed, however, that in Barclay v. Lucas, the words were different from the present case; the clerk was to be taken into the service of the obligees as a clerk in their shop and counting-house, which might be supposed to mean the same house, however the individual partners might change. But without considering whether that were the true construction of those words, it is enough to say that there are no such words here. But we are now desired to construe an obligation to be answerable for money due to them (certain partners having been before named) to mean money due to any part of them, a construction which would be contrary to the words of the instrument; what is contended for is, to make this a bond to the persons then constituting the banking-house and their successors, which can not be admitted.

LAWRENCE, J.: A bond may be drawn with the condition now insisted on in argument by the plaintiff's counsel for the obligor to be answerable not only to the present but to all future partners in the house; but that has not been done here.

Per curiam.

Postea to the defendant.

WESTON ET AL. *v.* BARTON

4 *Taunt.* 673 (1812).

This was an action on a joint and several bond, given by Paul Catterall and John Watson the younger, as principals, and John Watson the elder, and the defendant, as sureties to William Weston the elder, Sir John Pinhorn, James Newsome, and William Weston the younger, the plaintiffs, and William Golding, since deceased, in the penal sum of £6,000. The condition of the bond, upon oyer, appeared to be, that whereas all the obligors had applied to the five obligees, and requested them, in their capacity of bankers, from time to time, to accept and discount bills of exchange and promissory notes, and to advance and pay moneys, for Catterall and Watson the younger, and for their use, and on their account (such acceptances and discounts not exceeding in the whole, at any period of time, the sum of £3,000) which the five obligees had consented to do, upon being indemnified against all loss, costs, charges, damages, and expenses, by reason thereof; therefore, if the obligors,

or any or either of them, should, at all times thereafter, upon request made, pay to the five obligees, their executors, administrators, or assigns, all such sum and sums of money, as at any time thereafter should be paid or advanced by the five obligees, or any of them, unto and for the use, or on the account of Catterall and Watson the younger, or which should or might become due or owing unto the five obligees by or from Catterall and Watson the younger, by reason of the nonpayment of the amount of any bills of exchange, promissory notes, or any other securities, which should thereafter be paid by Catterall and Watson the younger, into the hands of, or be accepted by the five obligees, for or on the account of Catterall and Watson the younger, as their bankers, upon discount, or otherwise, or for interest, commission, postage, notarial, and other charges whatsoever; and also if the obligors, or either of them, should, at all times thereafter, effectually keep indemnified the five obligees, and each of them, their, and each of their heirs, etc., against all loss, costs, charges, damages, and expenses whatsoever, which they, any, or either of them, should suffer, sustain, expend, or be put to, for or by reason of the nonpayment of any such bills, promissory notes, or other securities, or for or by reason of any of their dealings or transactions as bankers for Catterall and Watson the younger, or in any wise relating thereto, or otherwise, not exceeding £3,000 and costs, postage, commission, and interest, then the bond should be void. The defendant pleaded that after the making of the bond, on the 23d day of July, 1807, William Golding died, and that the obligors did, at all times after the making of the bond, upon request made, pay to the five obligees in the lifetime, to the plaintiffs, since the death of William Golding, all such sums of money as at any time after the making of the bond were paid or advanced by the five obligees, or any of them, in the lifetime of Golding, unto and for the use, and on account of Catterall and Watson the younger, or which did become due and owing unto the five obligees, by or from Catterall and Watson the younger, by reason of the nonpayment of the amount of any bills of exchange, promissory notes, or any other securities which were, after the making of the bond, paid by Catterall and Watson the younger, into the hands of, or accepted by the five obligees, for or account of Catterall and Watson the younger, as their bankers, upon discount or otherwise, or for interest, commission, postage, notarial, and other charges, whatsoever; and also that the obligors did, at all times after the making of the bond, effectually keep indemnified the five obligees, and each of them, and the executors, etc., of Golding, against all loss, costs, charges, damages, and expenses whatsoever, which the five obligees, or either of them, their or either of their assigns, or the executors or administrators of Golding, or any of them, did suffer, sustain, expend or were put to, for or by reason of the nonpayment of any such bills,

promissory notes, or other securities, or for or by reason of any of their dealings or transactions as bankers for Catterall and Watson the younger, or in any wise relating thereto, or otherwise, not exceeding £3,000 and costs, postage, commission, and interest, according to the tenor and effect of the condition. The plaintiffs in their replication assigned their first and third breaches upon transactions stated to have taken place in the lifetime of Golding, upon both of which the defendant took issue; and they assigned for the second breach that after the making of the bond and the death of Golding, £3,000 became due from, and yet was in arrear and unpaid, by Catterall and Watson the younger, to the plaintiffs, for and on account of divers sums of money, before that time, and after the making of the bond, lent and advanced by the plaintiffs, after the death of Golding, unto, and for the use, and on the account of Catterall and Watson the younger, and also by reason of the nonpayment of the amount of divers bills of exchange, promissory notes, and other securities, which, after the making of the bond, and death of Golding, were paid by Catterall and Watson the younger into the hands of, and accepted by the plaintiffs, and also for interest, commission, postage, notarial, and other charges; and they assigned for a further breach of the condition, that after the making of the bond, and death of Golding, the plaintiffs were put to great losses, costs, charges, damages, and expenses, by reason and on account of the nonpayment of divers such bills, promissory notes, and securities as aforesaid, which were respectively discounted, accepted, and became due and payable, after the death of Golding, and by reason or means of their transactions as bankers for Catterall and Watson the younger, and for costs, postage, commission, and interest, since the death of Golding, in the whole amounting to other £3,000 which was still in arrear. The defendant demurred to these breaches, and the plaintiff joined in demurrer.

The judgment of the court was on this day delivered by Mansfield, Ch. J.

The question here is, whether the original partnership being at an end, in consequence of the death of Golding, the bond is still in force as security to the surviving four; or whether that political personage, as it may be called, consisting of five, being dead, the bond is not at an end. The case has stood over in consequence of doubts which the court entertained on particular expressions in the bond. Many cases were cited at the bar; and the result of them is, that generally when a change takes place in the number of persons to whom such a bond is given, the bond no longer exists. These decisions certainly fall hard on the obligees; for I believe the general understanding is, that these securities are given to the banking house, and not to the particular individuals who compose it; and we should readily so construe the bond if the words would permit. The words of the condition on which the question depends

(and which his lordship now read over) again and again refer to the obligees' capacity of bankers; they were bankers, only as they were partners in their banking house, as it is called, and this security is conditioned to pay any money advanced by "them five or either of them." Taking those last words by themselves, it might at first be conceived that if any one of the five advanced money, this bond should secure it, but the words are afterwards explained, when it is seen that the money is to be paid to the five. Now it could never be intended that money advanced by one of them singly, should be repaid to the five; and this shews that the word "advanced by them or any or either of them," must be confined in their meaning to money advanced by any or either of them in their capacity of bankers, on behalf of all the five. This, then, being the construction of the instrument, from almost all the cases, in truth we may say, from all (for though there is one adverse case of Barclay v. Lucas, 1 T. R. 291, the propriety of that decision has been very much questioned), it results that where one of the obligees dies, the security is at an end. It is not necessary now to enter into the reasons of those decisions, but there may be very good reasons for such a construction; it is very probable that sureties may be induced to enter into such a security, by a confidence which they repose in the integrity, diligence, caution, and accuracy of one or two of the partners. In the nature of things there can not be a partnership consisting of several persons, in which there are not some persons possessing these qualities in a greater degree than the rest; and it may be, that the partner dying, or going out, may be the very person on whom the sureties relied; it would therefore be very unreasonable to hold the surety to his contract, after such change. And though the sum here is limited, that circumstance does not alter the case; for although the amount of the indemnity is not indefinite, yet £3,000 is a large sum; and even if it were only £1,000 the same ground in a degree holds, for there may be a great deal of difference in the measure of caution or discretion with which different persons would advance even a thousand pounds; some would permit one who was almost a beggar to extend his credit to that sum; others would exercise a due degree of caution for the safety of the surety: and therefore we are of opinion that as to such sums only, which were advanced before the decease of Golding, can an indemnity be recovered by the plaintiffs: and as to the sums claimed for debts incurred since his decease, the judgment must be for the defendant.

Judgment for the defendant.

See also Wright v. Russell, 3 Wils. 530; Holland v. Teed, 7 Hare 56; Dry v. Davy, 10 Ad. & Ell. 30; Bellairs v. Ebsworth, 3 Camp. 53.

BLACK *v.* ALBERY ET AL.

89 *Ohio St.* 240, 106 *N. E.* 38 (1914).

Walter E. Albery and Reno P. Sagar brought suit in the court of common pleas against Samuel L. Black and Ned A. Thompson, alleging that on the 26th day of March, 1908, the plaintiffs and one L. B. Condit were partners transacting business at Groveport, Ohio, as the Groveport Creamery Company; that the defendant Thompson was doing business as the Thompson Creamery Company; that upon said day said Albery, Sagar and Condit, as parties of the first part, and said Thompson as party of the second part, entered into a contract whereby the parties of the first part agreed to furnish to the party of the second part for one year, beginning April 1, 1908, the entire output of their creamery, and he agreed to pay for the same at prices named in the contract.

They further allege full performance on their part and a failure of Thompson to pay for a large part of the products so delivered to him, annexing to their petition an account of the items so delivered but not paid for. A recovery was sought against Thompson for failure to perform his agreement aforesaid, and against Black as surety for him, Black's undertaking being indorsed upon the contract between the principal parties, and being in the terms following, to wit: "For value received I bind myself as surety for the faithful performance of the above contract by and on the part of said N. A. Thompson."

The petition further alleges that after the making of said contract, but before the first day of April, when it was to become operative, Condit sold and transferred to the plaintiffs his entire interest in the property and business of the Groveport Creamery Company. Black demurred generally to the petition and his demurrer was overruled. After issues of fact joined, there was a trial and judgment against both Thompson and Black. Thompson does not here complain of the judgment against him. Black filed a petition in error in the circuit court, his principal assignment of error being the overruling of his demurrer to the petition. The circuit court affirmed the judgment of the court of common pleas.

Shauck, J.: The ground upon which Black challenges the validity of the judgment against him is brought into plain view by his demurrer to the petition. It is alleged in the petition that the original contract was executed between Albery, Sagar and Condit, doing business as partners under the name of the Groveport Creamery Company, of the first part, and Thompson of the second part. It was by writing indorsed upon that contract that Black assumed or proposed to assume the liability of surety for Thompson, and his undertaking was to the parties of the first part therein. It is fur-

ther alleged that after the making of the contract, but before April 1, when by its terms its execution was to commence and before any credit had been given to Thompson in reliance upon Black's undertaking as surety for him, Condit assigned to Albery and Sagar his entire interest in the property and business of the firm, including his interest in the contract. The suit is brought by Albery and Sagar, and their petition not only admits the dissolution of the firm by the assignment of Condit's interest but counts upon it as dispensing with the necessity for his joining in the action. The essential theory of the case presented by the original plaintiffs, therefore, is that in a contract of suretyship, without the surety's consent, a substantial change has been effectively made in the parties adversary to him. In view of the ancient character and frequently recurring relation of surety, it is quite natural that in the reported cases are found many elementary principles of the law, relating to the liability of sureties and the cases illustrating and applying them, from which tests of the soundness of this view may be derived. The rules by which the surety's liability is determined have regard to the fact that usually he derives no benefit from the transaction and he is bound only because he has agreed to become bound; there being present no fact which would tend to raise an implied obligation. It is required that his undertaking be in writing. Since he is bound only because he has agreed to be bound, it logically results that he is bound only as he has agreed to be bound. From these and other like considerations there have been formulated and approved certain suggestive precepts respecting the surety's obligation: The surety is the favorite of the law; the surety is entitled to stand upon the letter of his obligation; the surety's defense is complete whenever he may say, "Into this contract I did not enter." It is a subject of frequent observation that the differences between opposing counsel do not relate to the soundness of legal propositions so much as their applicability to the case under consideration. Many of the propositions made and the authorities cited in the briefs for the defendants in error may be disposed of by excluding from consideration attributes which do not belong to the present case. It is not a case for recovery upon the assignment of a claim which had accrued upon a contract executed before its assignment. It does not concern the meaning of the terms used in a contract of suretyship into which the parties to the suit have confessedly entered. Nor does the case present the considerations which determine the liability of a surety upon a negotiable instrument accepted by the payee, thus having the operation and effect intended by the surety. Nor can Black's undertaking be likened to a general letter of credit.

The reference to letters of credit is, however, appropriate because they have been the foundation of many interesting cases upon the subject of the liability of sureties. Counsel seem to agree that guar-

anties and letters of credit are special or general. If a letter of the former character is accepted and acted upon by the person to whom it is addressed, the undertaking of the surety is complete. If the acceptance is by another, or by part only of those to whom the letter is addressed, there arises no contractual relation, for it is the right of one who contemplates assuming the obligation of a surety to determine not only for whom, but also to whom he will become bound. If in the present instance Black had addressed a letter of credit to the three parties of the first part offering to become bound for the payment of a balance which might become due from Thompson, and his letter had been accepted and acted upon by two of them, but not by the third, would there be a contract of suretyship between Black and the two acceptors? In the courts below it was not perceived, nor is it here, why Black should choose to be bound to the three parties rather than to two of them, but the admonition recurs, the surety is bound only according to the terms of his contract without being answerable to any one for the reasons which induced him to select its terms. Numerous and interesting cases show that the surety may not be held otherwise, even though the obligation upon which it is sought to charge him is not more onerous than that upon which he became bound or offered to become bound.

In Grant v. Naylor, 4 Cranch 224, a recovery was denied to John and Jeremiah Naylor & Co. on a letter of credit addressed by the maker to John and Joseph Naylor & Co., although it was shown that there was no such house as that addressed. In the opinion the chief justice said: "That the letter was really designed for John and Jeremiah Naylor can not be doubted, but the principles which require that a promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a general and wise policy, which this court can not relax so far as to except from its operation cases within the principles." A surety upon a promissory note may interpose as a defense against a holder, who has knowledge of the fact that it was the intention of the parties that it should be discounted by a bank where it was made payable, that the note after being rejected by that bank was indorsed and put into circulation contrary to the intention of the parties. Numerous decisions of this court illustrate the scope and force of the rule that the surety is entitled to stand upon the letter of his undertaking, including his designations of the persons who may become his creditors. Stone v. Vance, 6 Ohio 246; Taylor v. Wetmore, 10 Ohio 490; Clinton Bank v. Ayres & Neil, 16 Ohio 283; Knox County Bank v. Lloyd's Admrs., 18 Ohio St. 352.

The law is a technical science, and since it is the duty of the courts to administer justice according to the law with reference to which the parties are conclusively presumed to have conducted

their transaction, a surety who invokes the protection afforded him by established rules should not be denied that protection upon the ground that his defense is technical. Justice administered according to the peculiar views respecting the natural rights of litigants which may be entertained by persons who, for the time being, are engaged in the exercise of judicial functions, would not afford a secure foundation for civil institutions. This case seems clearly to be brought within the principles already stated, and within the decisions cited, by the consideration that in legal effect Black's formal guarantee indorsed upon the original contract was never accepted or acted upon by the three parties to whom he had offered to become bound, and to whom he would have been bound if they had accepted and acted upon his offer.

These views lead to the approval of Schoonover v. Osborne Brothers, 109 Iowa 453, which differs in no substantial aspect from the present case. The very careful and analytical opinion of Deemer, Judge, in that case collects and classifies many other authorities upon the subject presented and shows that the reasoning upon which the present judgment is sought to be sustained is fallacious.

Judgment reversed and demurrer to the petition sustained.

Nichols, C. J., Johnson, Donahue, Wanamaker, Newman and Wilkin, JJ., concur.

Accord: Cremer v. Higginson, 1 Mason 323; Holmes v. Small, 157 Mass. 221, 32 N. E. 3; Crane Co. v. Specht, 39 Nebr. 123, 57 N. W. 1015, 42 Am. St. 562; Lamm v. Colcoid, 22 Okla. 493, 98 Pac. 355, 19 L. R. A. (N. S.) 901n; Penoyer v. Watson, 16 Johns. (N. Y.) 100; Byers v. Hickman Grain Co., 112 Iowa 451, 84 N. W. 500; Sollee v. Meugy, 1 Bailey (S. Car.) 620; Barnes v. Barrow, 61 N. Y. 39.

BACKHOUSE ET AL. *v.* J. C. HALL

6 *Best & Smith* 507 (1865).

Blackburn, J.: Our judgment is for the defendant. The action is on a guarantee bearing date the 25th February, 1858. (His Lordship read it.) This was signed by the defendant and another person. For some time before the guarantee was given the firm of G. W. & W. J. Hall had carried on business as shipbuilders. Several changes in the members of the firm had been occasioned by death and otherwise; and at the time the guarantee was given two widows and one G. S. Moore were carrying on the business. One of the widows died, at which period £2,286, 0s, 9d was due on the balance of account, for which the surviving members of the firm were responsible; and the business was still carried on by them. The death was not known to the plaintiffs for some years, though

it was known to the defendant at the time; but nothing is stated to show either that the defendant was under any obligation to inform the banking-house of that fact, or that he took any steps to conceal it. The plaintiffs therefore, not having heard of the death, would not ask for a fresh security and stop further advances if refused. The business was still carried on, but the debt ultimately exceeded £5,000 due from the firm, not composed of the same persons as at the time when the guarantee was given. That raises the question whether the defendant is bound to make good advances by the banking-house to the shipbuilding firm, consisting at the time of those advances of persons different from those composing it at the time the guarantee was given.

Before the Mercantile Law Amendment Act, 1856, 19 & 20 Vict., ch. 97, it was perfectly established by cases that a guarantee did not continue in force after a change in the firm in whose favour it was given, unless it appeared by its terms that it was intended it should so continue. When there was an express stipulation that the guarantee was with the firm or its successors, there could be no question. It had been so decided in Barclay v. Lucas, 3 Dougl. 321, 1 T. R. 291, note (a), although in that case there was a doubt whether the guarantee sufficiently expressed that it was to be a continuing one. We need not pronounce if that decision was right or not. But in Metcalf v. Bruin, 12 East 400, where a person became surety by bond for the faithful services of another to the Globe Insurance Company, which was not corporate body, and all other members thereof, the Court of King's Bench held that it sufficiently appeared that the obligor was to be answerable for the good conduct of the person employed to the individuals who constituted the Globe Insurance Company for the time being. This being the state of the law, came the Mercantile Law Amendment Act, 1856, the object of which was to render the English law uniform with that of Scotland, which was made uniform with it by Stat. 19 and 20 Vict., ch. 60, s. 7. By sect. 4 of the English act, no promise to answer for the debt, default, or miscarriage of a firm "shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of the firm, unless the intention of the parties, that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise." I think that enactment does not alter the law of England; at all events it follows the decisions which had taken place on it. It says first, a change of the firm shall put an end to the guarantee. That was so decided by the cases cited by Mr. Lush. Then comes the proviso, unless the intention of the parties that the guarantee should con-

tinue to be binding appear by express stipulation, an obviously just and proper provision, or unless it appear "by necessary implication from the nature of the firm or otherwise." This last provision means no more than that in such a case as Metcalf v. Bruin, 12 East 400, 2 Campb. 422, the law shall be the same as it was before: if the intention of the parties necessarily appears as it did in Metcalf v. Bruin, that intention shall guide.

Then comes the question can we say here that, by necessary implication from the nature of the firm or otherwise, the intention of the parties appears that this guarantee was to continue notwithstanding a change in the firm? I think it does not. So long as the parties were only liable to be altered by death there would be no change in the firm; but if they took in new partners there would. Now at the time this guarantee was given there was nothing to distinguish the shipbuilding firm from any other. The original firm remained, and all its partners could take in fresh ones. If the parties to a guarantee given to a firm mean that it is to continue in force though there be a change of partners, it is very easy to express that. But there is nothing of the sort here. It appears that some years afterward the defendant wrote a letter showing that he was under the impression that the guarantee continued, but we can not alter the construction of a written instrument on that account. We must construe it, and see from its terms what was the intention of the parties; and I see nothing to show that here was to be a continuing guarantee notwithstanding a change in the firm. Therefore, although it is a hard case on the plaintiffs, our judgment must be for the defendant.

Judgment for the defendant.

Shee, J., concurring.

Accord in holding that the creditor's ignorance of the change in the firm does not alter the rule. Burch v. De Rivera, 53 Hun 367, 6 N. Y. S. 206; Standard Oil Co. v. Arnestad, 6 N. Dak. 255, 69 N. W. 197, 34 L. R. A. 861, 66 Am. St. 604.

SECTION 4. NEGOTIABILITY AND TRANSFER OF GUARANTY

THE COMMERCIAL BANK ET AL. *v.* THE CHESHIRE PROVIDENT INSTITUTION

59 *Kans.* 361, 53 *Pac.* 131, 41 *L. R. A.* 175, 68 *Am. St.* 368 (1898).

Allen, J.: The defendant in error obtained judgment against the Commercial bank for $2,685, on a guaranty, in the following form, indorsed on a negotiable promissory note executed by Daniel Dart:

"For value received, the Commercial Bank hereby guarantees prompt payment of the interest on the within obligation and the payment of the principal at maturity. Witness our hands this 12th day of May, 1886.

"GEO. T. GUNERSEY, Cashier;
"L. U. HUMPHREY, President."

The note was made payable to the order of the Topeka Investment & Loan Company, and was by it indorsed before maturity to the Cheshire Provident Institution. The petition alleges that, at the time the note and mortgage securing the same were executed, the Commercial Bank, in writing and for a valuable consideration, executed the guaranty above copied. The answer of the Commercial Bank alleges that it as a corporation never had any interest in the note, and never received any value for the execution of the guaranty, that the officers of the bank had no authority to execute the guaranty, and that these facts were known to the payee of the note at the time of its delivery. To this answer the plaintiff replied with a general denial. The case was tried to the court, and a general finding was made in favor of the plaintiff, on which judgment was entered for the amount of the note and interest. Counsel for plaintiff in error claim, first, that the guaranty on which judgment was rendered was not a negotiable guaranty, because payable generally and not to order or bearer; second, that the indorsement of the note did not assign the guaranty; third, that, if it be conceded that the indorsement of the note operated as an assignment of it, all defenses against the first holder are available against the assignee; fourth, that the guaranty is void because the bank had no power to lend its credit in that manner.

The first point presents the most important question in the case, and one on which the authorities are conflicting. It will be noticed that the guaranty under consideration in this case contains no words of negotiability, but is indorsed on a negotiable instrument. In Daniel on Negotiable Instruments, the conflicting views of the courts and text writers are summarized; and, in § 1777, the author says:

"On the other hand, there are cases which maintain that, although the guaranty on the paper, written at the time of delivery, specifies no person to whom the guarantor undertakes to be liable, and has no negotiable words, it runs with the instrument to which it refers, partakes of its quality of negotiability, and any person having the legal interest in the instrument takes in like manner the guaranty as an incident, and may sue thereon. And it has been said in such a case, 'this view is consistent with the nature of the transaction, the evident intention of the parties, and the objects and uses of commercial paper.' This seems to us the better doctrine. By writing the guaranty on the paper, the guarantor evidences his intention to guarantee the contract of the maker. That contract be-

ing negotiable, is made with any and every person who may be the holder, and the guarantor is thus brought in privity with any and every person who becomes the holder."

This view of the law seems to us supported by reason and the weight of authority. A guaranty indorsed on a negotiable instrument is to be construed with the language of the instrument. The one under consideration in terms names no guarantee. The evident intent was to guarantee the payment to the legal holder of the note. We are unable to perceive any good ground for the position, taken by some of the authorities, that the guaranty inures to the benefit of the first holder of the paper, only. The transfer of the note by indorsement must certainly operate as at least an assignment of the guaranty. We think it does more, and that the guaranty passes by the indorsement as fully as the note itself. The Commercial Bank by its guaranty became a party to a negotiable instrument. It employed no words limiting its liability, and it must make good the terms of its promise to the legal holder of the paper. This view of the law is sustained by the following authorities: Story on Bills of Exchange, p. 458; Webster v. Cobb, 17 Ill. 459; Phelps v. Sargent, 71 N. W. 927; McLaren v. Watson's Executors, 26 Wend. 425; Partridge v. Davis, 20 Vt. 499; Jones v. Berryhill, 25 Iowa 289; Brandt on Suretyship and Guaranty, p. 47.

The view opposed to the negotiability of a guaranty, unless made negotiable by express terms, is taken by Mr. Randolph in his work on Commercial Paper, § 861, and the authorities sustaining that view are cited in the notes. Much stress and reliance are placed on the case of Briggs v. Latham (36 Kans. 205, 13 Pac. 129). In that case a recovery was sought on a guaranty written on a mortgage, securing the note. It was a guaranty of the payment of the mortgage. The mortgage itself was not a negotiable instrument, and there were no words of negotiability in the guaranty. We are entirely satisfied with the decision of that case. The dictum contained in the opinion, seemingly opposed to the conclusion reached in this case, being entirely outside of the question before the court, is not of binding authority. That the guaranty is assignable and passes with the assignment of the debt guaranteed does not admit of doubt. Reed v. Garvin, 12 S. & R. 100; Claflin v. Ostrom, 54 N. Y. 581; Harbord v. Cooper, 43 Minn. 466, 45 N. W. 860; Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379.

The general finding in favor of the plaintiff below is a complete answer to all questions urged on our consideration, except that as to the negotiability of the guaranty and the effect of the indorsement of the paper as an assignment of it.

The judgment is affirmed.

Accord: Wooley v. Moore, 61 N. J. L. 16, 38 Atl. 758; Craig v. Parkis, 40 N. Y. 181, 100 Am. Dec. 469; Lemmon v. Strong, 59 Conn. 448, 22 Atl. 293, 12 L. R. A. 270, 21 Am. St. 123; Cole v. Merchants' Bank, 60 Ind. 350.

Contra holding that a guaranty on a note is enforceable only by the party to whom it was given. Springer v. Hutchinson, 19 Maine 359; Irish v. Cutter, 31 Maine 536; Smith v. Dickinson, 6 Humph. (Tenn.) 261, 44 Am. Dec. 306.

Although the guaranty of a negotiable instrument may be enforced by the holder of the instrument, the guaranty is not negotiable in the strict sense, but the assignee takes it subject to any defense existing against it. Carter v. Dubuque, 35 Iowa 416; First Nat. Bank v. Carpenter, 41 Iowa 518; Waldron v. Harring, 28 Mich. 493; Hayden v. Weldon, 43 N. J. L. 128, 39 Am. Rep. 551.

It has been held that although the guaranty may be enforced by the holder, suit must be brought in the name of the person to whom the guaranty was made. Edgerly v. Lawson, 176 Mass. 551, 57 N. E. 1020, 51 L. R. A. 432; Northcumberland County Bank v. Eyer, 58 Pa. St. 97.

CHARLES B. EVERSON, RESPONDENT, *v.* R. NELSON GERE ET AL., APPELLANTS

122 *N. Y.* 290, 25 *N. E.* 492 (1890).

HAIGHT, J.: This action was brought to recover the amount due upon a promissory note guaranteed by the defendant.

It appeared that on the 12th day of February, 1884, the Syracuse Iron Works executed its promissory note for $36,000, payable to the order of Charles E. Hubbell, treasurer, twelve months after date, with interest at six per cent. per annum, payable semi-annually; that the note was indorsed by Charles E. Hubbell, treasurer, "pay John Crouse & Co. or order," and delivered to them, and attached thereto was the following guaranty signed by the defendants: "For value received of John Crouse & Co., we do hereby guarantee to said John Crouse & Co. the payment of the note hereto annexed, made by the Syracuse Iron Works, for $36,000. Said note being dated February 12, 1884, payable twelve months after date at the Merchants' National Bank of Syracuse, with interest at six per cent. per annum, payable semi-annually." Subsequently, and before the maturity of the note, John Crouse & Co. indorsed the same to the plaintiff "without recourse," and at the same time executed and delivered an assignment thereof, together with the written guaranty attached thereto. The trial court granted a nonsuit upon the following grounds: That the guaranty sued upon is special, personal to John Crouse & Co., and did not accrue to the benefit of the plaintiff. That no cause of action had accrued upon the guaranty at the time of its assignment, and that no cause of action thereon was or could be assigned to the plaintiff. That John Crouse & Co. having undertaken to assign the guaranty before the maturity of the note, the plaintiff acquired no right thereunder and can not maintain the action.

The later propositions are involved in the former, so that but one question requires discussion, and that is whether the guaranty sued upon is special and personal to John Crouse & Co., or is to be regarded as a general guaranty for the payment of the note. It will be observed that the guaranty was executed and attached to the note at the same time that it was indorsed and delivered to John Crouse & Co. By the general rules of construction, papers thus executed and delivered are to be considered together as one instrument, and the intention of the parties determined therefrom. (McLaren v. Watson, 26 Wend. 425; Church v. Brown, 21 N. Y. 315-319.)

The note upon which the guaranty was attached was negotiable, and was indorsed payable to the order of John Crouse & Co. By the guaranty the defendant undertook to pay John Crouse & Co. in case the maker did not pay the note at its maturity. It was transferable from person to person by indorsement. No trust or confidence was imposed in John Crouse & Co., and it consequently appears to us that it was the intention of the parties to undertake to pay the note to them, or to the person or persons to whom they should transfer it. (Stillman v. Northrup, 109 N. Y. 473-481; Craig v. Parkis, 40 id. 181; Claflin v. Ostrom, 54 id. 581; U. Bank v. Executors, 3 id. 203.)

A special guaranty is limited to the person to whom it is addressed, and usually contemplates a trust or reposes a confidence in such person. Such a guaranty may not be assignable until a right of action has arisen thereon. (E. N. Bank v. Kaufmann, 93 N. Y. 273.)

In that case the defendants had written Bingham Brothers to the effect that any draft that they may draw on A. Feigelstock of their city they guaranteed to be paid at maturity. Here was trust and confidence reposed. The draft or drafts were to be drawn in the future, and as contemplated by the parties in the natural course of their business transactions. But in the case at bar the guaranty was attached to a promissory note previously executed and delivered. Its amount and time of payment was fixed. The defendants undertook to pay if the maker did not, and it could make no difference to them whether they paid to John Crouse & Co., or to some other person to whom they had transferred their claim.

We consequently are of the opinion that the order of the General Term should be affirmed and judgment absolute ordered for the plaintiff upon the stipulation.

All concur except Follett, Ch. J., not sitting.

Order affirmed and judgment accordingly.

ANCHOR INVESTMENT COMPANY *v.* F. S. KIRKPATRICK ET AL.

59 *Minn.* 378, 61 *N. W.* 29, 50 *Am. St.* 417 (1894).

The defendants, F. S. Kirkpatrick, Egbert G. Handy and Joseph A. Humpreys, on September 21, 1891, executed and delivered to the Commercial Bank of St. Paul their guaranty that the Columbia Electric Company, a domestic corporation, would pay the bank any and all indebtedness it might then or thereafter owe the bank, and therein stated that the guaranty is an open and continuing one to remain in force until revoked in writing. Between April 9 and April 23, 1892, the bank loaned to the Columbia Electric Company $11,000 and took its four several notes each for a part thereof and each due fifteen days after its date. The notes were not paid and on February 27, 1893, the bank sold and assigned the notes to the plaintiff and transferred to it all rights under the guaranty. Plaintiff brought this action upon the guaranty, alleged the loan, its nonpayment and the assignment, and prayed judgment for $10,000. Kirkpatrick alone answered. The issues were tried October 4, 1894, before the court, without a jury. The facts above stated were shown in evidence and plaintiff rested. Defendant Kirkpatrick moved that the action be dismissed on the ground that the right of the bank under the guaranty is not assignable. The court granted the motion. Plaintiff excepted, moved for a new trial and being denied, appeals.

Burk, J.: In the month of April, 1892, the Columbia Electric Company executed and delivered to the Commercial Bank of St. Paul its four promissory notes, amounting to the sum of $11,000 and interest, each note payable fifteen days after its date. At the time said notes were given, the bank held a continuing guaranty in writing, signed by the defendants, whereby they guaranteed unconditionally and at all times the payment to said Commercial Bank of St. Paul of any and all indebtedness or liability now or hereafter owing to said bank by the Columbia Electric Company, not to exceed the sum of $10,000, and waive any and all demands of payment and notice of protest or default.

On the 28th day of February, 1893, and after the maturity of these notes, the Commercial Bank of St. Paul assigned them in writing to this plaintiff, and the assignment, after describing the notes, contained these words: "Together with all securities which said bank may hold, securing any property or indebtedness."

The plaintiff brought this action against the defendants as guarantors of the payment of said notes. The defendants interposed an answer consisting of a general denial. There was no controversy

as to the making and delivery of the notes, and on the trial it was admitted that they represented an indebtedness owing from the Columbia Electric Company to the Commercial Bank which had not been paid, and that the notes had been assigned to the plaintiff.

The only question raised upon the trial, as appears from the evidence, was as to the assignability of the guaranty. This question was raised when the plaintiff offered the guaranty in evidence, to which the defendant objected upon the ground that it was immaterial, irrelevant, incompetent, and by its terms is a personal agreement, and is not assignable or negotiable, which objection was sustained by the court, and the plaintiff duly excepted. On the trial it was admitted that plaintiff was the holder of the notes, and that they had been assigned to it. On motion of the defendant, judgment was ordered by the court against the plaintiff. By the terms of the written guaranty it was to remain in full force until revoked in writing. It was dated September 21, 1891, and expressed upon its face that it was given for a valuable consideration.

There can be no question but that the Commercial Bank could have brought suit directly in its own name upon this guaranty, as it was expressly given to secure to the bank any and all indebtedness or liability which then existed, or which should thereafter exist, on the part of the Columbia Electric Company to the bank, in whatever manner any such indebtedness or liability may have been, or might thereafter be, created. Here was a legal liability on the part of the guarantors which attached to any indebtedness which the Columbia Electric Company owed the bank. It did owe the bank the indebtedness represented by these notes. There was a legal contract between the guarantors and the bank to pay a certain indebtedness held by the bank, to wit, these notes. There can be no question but that the notes could be transferred or assigned. But they represented the same indebtedness in the hands of the bank that the guaranty did, and which it also held. Why should they not be assignable together, in and as one transaction, and as a proper, legitimate mode of doing business?

The terms of the guaranty were unusually broad. The terms of the assignment were broad enough to include an assignment of this guaranty; and, unless forbidden by some rigid rules of law, the notes and the guaranty of their payment should pass together. The guaranty was executed for the benefit of the bank. That is too apparent to need discussion. It, however, guaranteed the payment to the bank of the indebtedness of only one party, viz., the Columbia Electric Company. If the guarantors had paid these notes of $10,000 to the bank, they would have done just what they had agreed to do by the terms of their guaranty. If they paid the same amount to this plaintiff as the assignee of the notes and guaranty, they are in no way harmed or damaged. The change is as to the plaintiffs

or parties in interest, not as to any greater or less liability upon the part of the guarantors. There are no restrictive terms in the guaranty as to its assignability; that is, there are no terms which make it a special guaranty, applicable only to the party to whom it was given, to wit, the Commercial Bank. But, even in cases of ordinary special guaranty, the guaranty is assignable after default, and when a cause of action has arisen thereon. Evansville Nat. Bank v. Kaufmann, 93 N. Y. 273.

Now, the Commercial Bank paid a valuable consideration for the benefit of this guaranty. It is so expressed in the instrument. Why should it not have the full benefit of what it paid for? The right of assignment was a valuable right to the bank. Its contract with the defendants should be construed as other contracts are construed; that is, to carry out the intention of the parties. Construing it as it appears upon its face, it was the intention of the parties that just such an indebtedness as this, owing the bank by the Columbia Electric Company, should be paid. That obligation can be discharged by paying it to this plaintiff as well as to the bank. The gist of the obligation is payment of one or more debts. The party to whom it is under obligation to pay is immaterial, providing it was a fair business transaction between the bank and the Columbia Electric Company, and came within the terms of the guaranty. The guaranty should therefore go with the debt it secures. The plaintiff is the owner of the notes, and is the real party in interest. This guaranty is a chose in action, and the party for whose benefit it was made should have the right to make it as effectual and beneficial as possible.

In the case of Thallhimer v. Brickerhoff, 3 Cow. 645, the chancellor, in giving his decision upon the general principles applicable to the transfer of causes of action, uses this very sensible language: "But the rule of the common law that rights of action can not be assigned has in modern times been reversed; the apprehension that justice would be trodden down if property in action should be transferred is no longer entertained; and the ancient rule now serves only to give form to some legal proceedings. In courts of equity this rule was never followed, and those courts have always considered and treated the rule as unjust, and have supported assignments of rights of action. Experience has fully shown, not only that no evil results from the assignment of rights of action, but that the public good is greatly promoted by the free commerce and circulation of property in actions, as well as of property in possession."

In a general sense, this language is applicable to this case, and confirmatory of the views which we have endeavored to express. We are of the opinion that the instrument of guaranty was assignable, and that by such assignment the plaintiff became the true owner thereof, and that it was entitled to bring this action for its

use and benefit. See Schlieman v. Bowlin, 36 Minn. 198 (30 N. W. 879).

The order denying the motion for a new trial is reversed.

Accord: Weir v. Anthony, 35 Nebr. 396, 53 N. W. 206.

THE TIDIOUTE SAVINGS BANK, RESPONDENT, *v.* LIBBEY AND OTHERS, APPELLANTS

101 *Wis.* 193, 77 *N. W.* 182, 70 *Am. St.* 907 (1898).

In the month of February, 1895, and for a long time prior thereto, the firm of W. T. Rickards & Co. was engaged in the business of banking, and the purchase and sale of commercial paper and securities, at Chicago, Ill. On February 25, 1895, the defendants executed and delivered to said firm a written guaranty of the following tenor: "For and in consideration of the sum of one dollar to each of us in hand paid, and in consideration of the granting of credit and discount by W. T. Rickards & Co., of Chicago, Ill., to the Farson & Libbey Company, a corporation of Chicago, Ill., we, for ourselves, and for our heirs, executors, administrators and assigns, do hereby jointly and severally guaranty to said W. T. Rickards & Co., their heirs, executors, administrators, or assigns, the payment of any and all indebtedness now due or hereafter to become due, to said W. T. Rickards & Co., their heirs, executors, administrators, or assigns, growing out of or occasioned by any or through any act or acts of the said Farson & Libbey Company. It is further agreed that such guaranty shall remain in full force and effect in respect to all indebtedness or renewals thereof now existing or hereafter to accrue, growing out of any and all transactions originating prior to the time a notice in writing of the cancellation of this guaranty, signed by either of the undersigned, shall be received by said W. T. Rickards & Co. It is provided, however, that the undersigned shall not be liable under this guaranty for an amount to exceed the sum of twenty thousand dollars ($20,000). The undersigned hereby waive notice of the acceptance of the guaranty and of the amount of the indebtedness existing from time to time from said Farson & Libbey Company to said W. T. Rickards & Co."

This guaranty was in full force at the time of the purchase and discount by W. T. Rickards & Co. of the notes hereinafter mentioned. On September 11, 1895, the City Sash & Door Company executed and delivered to the Farson & Libbey Company its promissory note for $885.11, due in four months. On October 7, 1895, under and pursuant to the said contract of guaranty, the Farson & Libbey Company sold and indorsed said note to Rickards & Co. for

value, and, in writing on the back thereof, guaranteed the payment thereof at maturity, or at any time thereafter, with interest at seven per cent. On October 31, 1895, Rickards & Co. sold said note to the Tidioute Savings Bank, the plaintiff in one of said actions, who took it without notice of the existence of the written guaranty of the defendants to Rickards & Co. The note was presented for payment, duly protested, and notice given. At the date of the trial there was found to be due thereon the sum of $527.30, for which judgment was ordered against the defendants, and from which judgment this appeal was taken.

The facts in relation to the case of the First National Bank of Escanaba against these defendants are the same, except that it is founded upon a note of the Suburban Lumber Company to the Farson & Libbey Company, dated October 26, 1895, for $1,217.90, due in four months. This note was purchased by Rickards & Co. on November 15, 1895, and sold to the bank November 18, 1895. At the time of the sale to the bank it had notice of the defendants' written guaranty mentioned, and relied upon the same in making the purchase of said note. The amount found due thereon at the trial was $1,223.83, for which judgment was ordered for the bank.

These notes were sold by Rickards & Co. in the due course of business, and no formal assignment of the defendants' guaranty was made in either case. These actions are brought by the holders of each of said notes against the defendants, as makers of said written guaranty. The defendants have appealed from the judgments in favor of the plaintiffs, and the sole question is whether they are liable on said guaranty to the present holders of said notes.

Bardeen, J.: A guaranty is defined to be "a separate, independent contract, by which the guarantor undertakes, for a valuable consideration, to be answerable for the payment of some particular debt, or future debts, or the performance of some duty, in case of the failure of another person primarily liable to pay or perform;" and it is said that such guaranty is assignable, with the obligation secured thereby, and that it goes with the principal obligation, and is enforceable by the same persons who can enforce that. Colebrooke Collateral Securities, p. 253; Ellsworth v. Harmon, 101 Ill. 274; Claflin v. Ostrom, 54 N. Y. 581; Stillman v. Northrup, 109 N. Y. 475; Everson v. Gere, 122 N. Y. 290; Lane v. Duchac, 73 Wis. 655; W. W. Kimball Co. v. Mellon, 80 Wis. 143. The rule is that the transfer of a note carries with it all security without any formal assignment or delivery, or even mention of the latter. Carpenter v. Longan, 16 Wall. 271; Croft v. Bunster, 9 Wis. 503. A general guaranty is one open for acceptance by the public generally. A special guaranty is limited to the person to whom it is addressed, and usually contemplates a trust or reposes a confidence in such person. Such a guaranty may not be assignable until the right of action has arisen thereon. Jex v. Straus, 122 N. Y. 293, distinguishing

Evansville Nat. Bank v. Kaufmann, 93 N. Y. 273. The main contention of the defendants in the present case is that the guaranty upon which the action is founded is special, and limited to W. T. Rickards & Co., and was not available to the plaintiffs, their assignees. We do not think that the construction of the guaranty in question can be thus fairly restricted. We think that the guaranty, except as expressly limited by its terms, was a general, continuing one. The defendants executed the contract of guaranty "in consideration of the sum of one dollar to each of us in hand paid, and in consideration of the granting of credit and discount by W. T. Rickards & Co. to the Farson & Libbey Company," in which the defendants were jointly and severally interested as owners of all or of a large proportion of the capital stock thereof, and in whose success they were, and each of them was, particularly and financially interested. In other words, they gave the guaranty to secure the indebtedness on which the action is founded, for the benefit and advantage of a company in which they were themselves thus interested. The Farson & Libbey Company were anxious to realize on the notes in suit; took the same to W. T. Rickards & Co., and negotiated, sold, and delivered the same to that company; and it granted to said Farson & Libbey Company credit, discounted such notes, and paid it therefor the full value and amount thereof, less interest and brokerage. The transfer of these notes to the plaintiffs carried with it, by operation of law, all securities for their payment. The debt is the principal thing, and the securities are only an incident. The transfer of the former, therefore, carries with it the right to the securities, and amounts to an equitable assignment of them. No matter what the form of the security is, whether a real estate or chattel mortgage, or a pledge of collateral notes, bonds, or other personal property, the purchaser of the principal takes with it the right to resort to these securities; and this is so, although the assignment or transfer does not mention them. The reason of this rule, within all the authorities, seems to be that when the mortgagee transfers the debt, without assigning the mortgage or other security, he becomes a trustee, and holds the security for the benefit of the owner of the note, and the latter may enforce the trust. The debtor is in no wise injured by such rule. He has agreed that the security shall stand for the payment of the debt, and it is of no consequence to him to whom it is paid. He has to pay it but once.

The guaranty is to pay any and all indebtedness to said W. T. Rickards & Co., their heirs, executors, administrators, and "assigns," incurred by Farson & Libbey Company. It is said that the word "assigns" means substantially nothing in this connection; that it is a mere formal phrase. We can not so regard it. It either means that the defendants were to guaranty this paper in the hands of any assignee of Rickards & Co., or it means absolutely nothing. Rickard & Co. were bankers and brokers. Their business was

dealing in commercial paper, both buying and selling it, all of which defendants well knew. Their purpose in giving this guaranty was to give to the Farson & Libbey Company a credit of $20,000 with these brokers. It was perfectly natural, therefore, that the brokers desired to have this paper protected, not only in their hands, but in the hands of their customers. We conclude, therefore, that this phrase was an apt one to express the real intention of the parties, and that it means precisely what it says. Rickards & Co. hold the security for these notes in trust, and the purchasers of the notes are entitled to enforce the trust. The guaranty was given for the payment of these notes, among others, and, within the rule of the authorities, it would seem that the purchasers from Rickards & Co. have the right to resort to the guaranty.

The fact that the Tidioute Savings Bank did not know of the existence of this guaranty at the time it purchased the City Sash & Door Company note is of no significance. The securities pledged for a debt follow it, in equity, no matter how the debt be modified or into whose hands it may come. Until the debt is paid, the pledge accompanies it, and remains for its payment, and is available to all who may acquire title thereto. Colebrooke Collateral Securities, p. 79; Stearns v. Bates, 46 Conn. 306. The guaranty in question was given to secure the payment of any and all indebtedness due, or thereafter to become due, to Rickards & Co., or their assigns, "growing out of or occasioned by any or through any act or acts of the said Farson & Libbey Company." The defendant used apt words to make the guaranty impersonal, so far as the holders of the debts so created are concerned. They executed and delivered a contract as security for all the debts created by the Farson & Libbey Company to Rickards & Co. within the amount limited, which became an incident to each such debt, and which passed to the bank pro rata, upon its purchase of the note, even though it may not have known of its existence at that time. Keyes v. Wood, 21 Vt. 331; Evertson v. Booth, 19 Johns. 486. To require the defendants to pay these notes is but to require them to fulfil their promise. It entails no hardship and creates no obligation beyond the plain tenor of their contract.

The argument that the guaranty was personal with Rickards & Co., as imposing special trust and confidence in the members of that firm, falls of its own weight. A bare reference to the paper itself would seem to dispel any such illusion. The case of Evansville Nat. Bank v. Kaufmann, 93 N. Y. 274, falls far short of sustaining their contention.

On the whole case, the conclusion of the trial court meets with our entire approval.

By the court. The judgment of the circuit court in both cases is affirmed.

SECTION 5. NOTICE OF ACCEPTANCE OF GUARANTY

RUSSELL *v.* CLARK

7 Cranch (U. S.) 69 (1812).
(See ante, page 138.)

SAMUEL B. LEE, PLAINTIFF IN ERROR, *v.* NATHANIEL DICK ET AL.

10 *Pet. (U. S.)* 482, 9 *L. ed.* 503 (1836).

On the 24th of September, 1832, Samuel B. Lee, the plaintiff in error, of Memphis, Tenn., addressed to N. & J. Dick & Co., at New Orleans, a letter in the following terms:

"GENTLEMEN—Nightingale & Dexter, of Maury County, Tennessee, wish to draw on you at six and eight months; you will please accept their draft for 2,000 dollars, and I do hereby guarantee the punctual payment of it.

"SAMUEL B. LEE."

On the same paper containing this guaranty, and on the same day, Mr. Lee wrote a letter to Dexter, in which he says, "I have no objection to guaranty your bill, except it might effect my own operations. I however send guarantee for 2,000 dollars, which you can use if you choose. The balance, I have no doubt, your friend Mr. Watson will do for you. I would cheerfully do the whole amount, but expect to do business with that house and do not wish to be cramped in my own operations."

On the 5th day of October, 1832, Nightingale & Dexter, at Nashville, having forwarded the letter of guaranty given by the plaintiff in error, drew a bill of exchange for $4,250 on N. & J. Dick, at New Orleans, payable six months after date; which bill was accepted on the faith of the guaranty, and they paid the same, and gave notice to Mr. Lee that they looked to him for the money.

The defendants in error not having been repaid the amount of the bill by the drawers, instituted an action against Samuel B. Lee, on his guaranty; and in September, 1835, the cause was tried, and a verdict and judgment were rendered in favor of the plaintiffs.

During the progress of the trial of the cause, the following bill of exceptions was tendered, and was sealed by the court:

The court charged the jury that if the defendant intended to guaranty a bill of exchange, to be drawn for $2,000, he would not be liable upon a bill drawn for upward of $4,000; but if he intended to guaranty $2,000 of a bill to be drawn for a larger amount, that then he would be liable for the $2,000. That the court

was of opinion the letter accompanying the guaranty was admissible in evidence to explain whether the guarantor meant to guaranty a bill for $2,000 or only $2,000 in a bill for a larger amount; and it was the opinion of the court that the true construction of the guaranty was that he intended to guaranty the payment of $2,000 in a bill to be drawn for a larger amount. The court also charged the jury that no notice by N. & J. Dick & Co. to the defendant that they intended to accept or had accepted and acted upon this guaranty was necessary.

The defendant prosecuted this writ of error.

Mr. Justice Thompson delivered the opinion of the court.

This case comes up on a writ of error from the circuit court of the United States for West Tennessee. It was a special action on the case, on a guaranty given by the plaintiff in error in favor of Nightingale & Dexter. The declaration is special, stating that the defendant in the court below, by his guaranty bearing date the 24th of September in the year 1832, directed and addressed to the plaintiffs below, requested them to accept the draft of Nightingale & Dexter for the amount of $2,000, and thereby promised to guaranty the punctual payment of the same to that amount; and avers that Nightingale & Dexter afterward, on the 5th of October, 1832, drew a bill on the plaintiffs below for $4,250; and that, confiding in the promise of the defendant, they accepted the same, etc. The declaration by the defendant to guaranty the payment of $2,000, part of the $4,250, with the necessary averments to charge the defendant with the payment of the $2,000.

The defendant pleaded the general issue; and upon the trial of the cause, the plaintiff produced the following evidence:

"MEMPHIS, September 24th, 1832.

"Messrs. N. & J. Dick & Co.:

"GENTLEMEN—Nightingale & Dexter, of Maury County, Tennessee, wish to draw on you at six or eight months' date. You will please accept their draft for 2,000 dollars, and I do hereby guaranty the punctual payment of it. Very respectfully your obedient servant.

"SAMUEL B. LEE."

"NASHVILLE, October 5th, 1832.

"Exchange for $4,250.00.

"Six months after date of this first of exchange (second unpaid), pay to H. R. Hill, or order, 4,250 dollars — cents value received, and charge the same to account of yours, etc.

"NIGHTINGALE & DEXTER."

"To N. & J. Dick & Co., New Orleans."

The plaintiff also offered in evidence the following letter of the defendant, Samuel B. Lee; which letter was written upon the same sheet of paper with the guaranty, but on different parts of it.

"MEMPHIS, September 24th, 1832.

"Mr. P. B. Dexter:

"DEAR SIR—Yours of the 15th inst. came to hand in due time. I was absent, or should have answered it sooner. I left Mount Pleasant sooner than I expected when I saw you last. I learned that my presence was wanted at Savannah, and put o p h. I had calculated to get along with business without having anything to do with drawing bills or with the bank; but there is no cash in this quarter, and our bills at the east are falling due, and I have no other alternative but to draw for what funds I am compelled to have, and may, during the winter (should I go largely into the cotton market), wish to draw for a considerable amount. I have no objections to guaranty your bill, except it might affect my own operations. I, however, send a guaranty for 2,000 dollars, which you can use if you choose. The balance, I have no doubt, your friend Mr. Watson will do for you. I would cheerfully do the whole amount, but expect to do business with that house, and do not wish to be cramped in my own operations. Spun thread, also coarse homespun are in good demand. My compliments to Mrs. and Miss Nightingale. Your friend,

"SAMUEL B. LEE."

It was agreed by the counsel that the bill of exchange and letter should go to the jury, and their effect, etc., be charged upon by the court. The plaintiff proved that N. & J. Dick & Co. accepted the above bill, upon the faith of the said guaranty, and that they had paid it, and gave notice to the defendant that they looked to him for the money. The court charged the jury that if the defendant intended to guaranty a bill of exchange to be drawn for $2,000, he would not be liable for a bill drawn for upward of $4,000. But if he intended to guaranty $2,000 of a bill to be drawn for a larger amount, then he would be liable for the $2,000. That the court was of opinion that the letter accompanying the guaranty was admissible in evidence to explain whether the guarantor meant to guaranty a bill for $2,000, or only $2,000 in a bill for a larger amount. The court also charged the jury that no notice by N. & J. Dick & Co. to the defendant, that they intended to accept, or had accepted and acted upon this guaranty was necessary. To which opinion of the court the defendant excepted.

The questions arising upon this case are:

1st. Whether this evidence will warrant the conclusion that the defendant intended to guaranty $2,000 in a bill to be drawn for a larger sum.

2nd. Whether N. & J. Dick & Co. were bound to give notice to the defendant that they intended to accept, or had accepted and acted upon the guaranty.

*   *   *   *   *   *   *

The next question is, whether the plaintiffs were bound to give notice to the defendant that they intended to accept, or had accepted and acted upon this guaranty. It is to be observed that this guaranty was prospective; it looked to a draft thereafter to be drawn, and this question is put at rest by the decisions of this court. The case of Russell v. Clark's Executors (7 Cranch 91) was a bill in chancery to recover a sum of money upon a guaranty alleged to grow out of several letters written by Clark & Nightingale to Russell. The court say: "We can not consider these letters as constituting a contract by which Clark & Nightingale undertook to render themselves liable for the engagements of Robert Murray & Co. to Nathaniel Russell. Had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendant, of the extent of his engagements." Although the point now in question was not precisely the one before the court in that case, as there was no contract of guaranty made out, yet it is laid down as a settled and undisputed rule. The case of Edmondston v. Drake & Mitchell (5 Peters 624) was an action founded on a letter of credit, given by Edmondston to Castello & Black, as follows: "Gentlemen: The present is intended as a letter of credit in favor of my regarded friends, Messrs. J. & T. Robinson, to the amount of 40 or 50,000 dollars; which sum they may wish to invest through you in the purchase of your produce. Whatever engagements these gentlemen may enter into, will be punctually attended to."

On the trial, the court was requested to instruct the jury that in order to make the defendant liable to the plaintiff under the contract, they were bound by the law merchant to give him due notice. Upon this prayer the court was divided, and the instruction was not given, and this court decided that the instruction ought to have been given. The court said it would indeed be an extraordinary departure from that exactness and precision which peculiarly distinguish commercial transactions, which is an important principle in the law and usages of merchants, if a merchant should act on a letter of this character, and hold the writer responsible without giving notice to him that he had acted on it. The authorities on this point, say the court, unquestionably establish this principle. And again, the case of Douglass et al. v. Reynolds et al. (7 Peters 125) was an action upon a guaranty; and the court was requested to instruct the jury that to enable the plaintiff to recover on the letter of guaranty they must prove that notice had been given, in a seasonable time after said letter of guaranty had been accepted by them, to the defendant, that the same had been accepted. This instruction the court below refused to give; and this court say the instruction asked was correct, and ought to have been given. That a party giving a letter of guaranty has a right to know whether it is accepted; and whether the person to whom it is addressed means to give credit on the foot-

ing of it or not. It may be most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate in a great measure his course of conduct, and his exercise of vigilance in regard to the party in whose favor it is given. Especially it is important in case of a continuing guaranty, since it may guide his judgment in recalling or suspending it. This last remark by no means warrants the conclusion that notice is not necessary in a guaranty of a single transaction; but only that the reason of the rule applies more forcibly to a continuing guaranty. It is unnecessary, after such clear and decided authorities in this court on this point, to fortify it by additional adjudications. We are not aware of any conflict of decisions on this point; and if there are, we see no reason for departing from a doctrine so long and so fully settled in this court.

We do not mean to lay down any rule with respect to the time within which such notice must be given. The same strictness of proof is not necessary to charge a party upon his guaranty as would be necessary to support an action upon the bill itself, when by the law merchant a demand upon, and refusal by the acceptors must be proved in order to charge any other party upon the bill. (8 East 245.) There are many cases where the guaranty is of a specific existing demand by a promissory note or other evidence of a debt; and such guaranty is given upon the note itself, or with a reference to it and recognition of it; when no notice would be necessary. The guarantor, in such cases, knows precisely what he guaranties, and the extent of his responsibility; and any further notice to him would be useless. (14 Johns. Rep. 349; 20 Johns. 365.) But when the guaranty is prospective, and to attach upon future transactions, and the guarantor uninformed whether his guaranty has been accepted and acted upon or not the fitness and justice of the rule requiring notice is supported by considerations that are unanswerable.

We are accordingly of opinion that the circuit court erred in deciding that notice was not necessary, and that the judgment must be reversed.

ERWIN DAVIS ET AL., PLAINTIFFS IN ERROR, *v.* WELLS, FARGO & CO.

104 *U. S.* 159, 26 *L. ed.* 686 (1881).

Mr. Justice Matthews delivered the opinion of the court.

The action below was brought by Wells, Fargo & Co., against the plaintiffs in error, upon a guaranty, in the following words:

"For and in consideration of one dollar to us in hand paid by Wells, Fargo & Co. (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the

extent of and not exceeding the sum of ten thousand dollars ($10,000.00) for any overdrafts now made, or that may hereafter be made, at the bank of said Wells, Fargo & Co.

"This guaranty to be an open one, and to continue one at all times to the amount of ten thousand dollars, until revoked by us in writing.

"Dated Salt Lake City, 11th November, 1874.

"In witness whereof we have hereunto set our hands and seals the day and year above written.

(Seal.)

"ERWIN DAVIS,
"J. N. H. PATRICK.

"Witness: J. GORDON."

The answer set up by way of defense, that there was no notice to the defendants from the plaintiffs of their acceptance of the guaranty, and their intention to act under it; and no notice, after the account was closed, of the amount due thereon; and no notice of the demand of payment upon Gordon & Co., and of their failure to pay within a reasonable time thereafter.

But there was no allegation that by reason thereof any loss or damage had accrued to the defendants.

On the trial it was in evidence that this guaranty was executed by the defendants below and delivered to Gordon on the day of its date, for delivery by him to Wells, Fargo & Co., which took place on the same day; that Gordon & Co. were then indebted to the plaintiffs below for a balance of over $9,000 on their bank account; that their account continued to be overdrawn, Wells, Fargo & Co. permitting it on the faith of the guaranty, from that time till July 31, 1875, when it was closed, with a debit balance of $6,200; that the account was stated and payment demanded at that time of Gordon & Co., who failed to make payment; that a formal notice of the amount due and demand of payment was made by Wells, Fargo & Co., of the defendants below, on May 26, 1876, the day before the action was brought. There was no evidence of any other notice having been given in reference to it; either that Wells, Fargo & Co. accepted it and intended to rely upon it, or of the amount of the balance due at or after the account was closed; and no evidence was offered of any loss or damage to the defendants by reason thereof, or in consequence of the delay in giving the final notice of Gordon & Co.'s default.

The defendant's counsel requested the court, among others not necessary to refer to, to give to the jury the following instructions, numbered first, second, third and fifth:

1. If the jury believes from the evidence that the guaranty sued upon was delivered by the defendants to Joseph Gordon, and not to the plaintiff, but was afterward delivered to the latter by Joseph

Gordon, or by Gordon & Co., it became and was the duty of Wells, Fargo & Co. thereupon to notify the defendants of the acceptance of said guaranty, and their intention to make advancements on the faith of it, and, if they neglected or failed so to do, the defendants are not liable on the guaranty, and your verdict must be for the defendants.

2. If Wells, Fargo & Co. made any advancements to Gordon & Co. on overdrafts on the faith of said guaranty, it became and was the duty of plaintiff to notify the defendants, within a reasonable time after the last of said advancements of the amount advanced under the guaranty, and if the plaintiff failed or neglected so to do, it can not recover under the guaranty and your verdict must be for the defendants.

3. What is a reasonable time in which notice should be given is a question of law for the court. Whether notice was given is one of fact for the jury. The court, therefore, instructs you that if notice of the advancements made under said guaranty was not given until after the lapse of twelve months or upward from the time the last advancement was made to Gordon & Co., this was not, in contemplation of law, a reasonable notice, and your verdict, if you so find the fact to be, should be for the defendants.

5. Before any right of action accrued in favor of plaintiffs under said guaranty, it was incumbent on it to demand payment of the principal debtor, Gordon & Co., and on their refusal to pay, to notify the defendants. If the jury, therefore, find that no such demand was made, and no notice given to the defendants, the plaintiff can not recover upon the guaranty.

The court refused to give each of these instructions, and the defendants excepted.

The following instructions were given by the court to the jury, to the giving of each of which the defendants excepted:

1. You are instructed that the written guaranty offered in evidence in this case is an unconditional guaranty by defendants, of any and all overdrafts, not exceeding in amount $10,000, for which said Gordon & Co. were indebted to the plaintiff at the date of the commencement of this suit. If the jury believes from the evidence that said guaranty was by said defendants, or by any one authorized by them to deliver the same, actually delivered and acted on the same, such delivery, acceptance and action thereon by plaintiff bind the defendants, and render the defendants responsible in the action for all overdrafts upon plaintiff made by Gordon & Co., at the date of said delivery of said guaranty, and which were unpaid at the date of the commencement of this suit, not exceeding $10,000.

2. The jury are instructed that the written document under seal, offered in evidence in this case, implies a consideration, and constitutes an unconditional guaranty of whatever overdraft, if any, not exceeding $10,000, which the jury may find from the evidence that

Gordon & Co. actually owed the plaintiff at the date of the bringing of this suit; and further, if you believe from the evidence that an account was stated of such overdraft between plaintiff and J. Gordon & Co., then the plaintiff is entitled to interest on the amount found due at such statement, from the date thereof, at the rate of ten per cent. per annum.

These exceptions form the basis of the assignment of errors.

The charge of the court first assigned for error, and its refusal to charge upon the point as requested by the plaintiffs in error, raises the question whether the guaranty becomes operative if the guarantor be not within a reasonable time informed by the guarantee of his acceptance of it and intention to act under it.

It is claimed in argument that this has been settled in the negative by a series of well-considered judgments of this court.

It becomes necessary to inquire precisely what has been thus settled, and what rule of decision is applicable to the facts of the present case.

In Adams v. Jones, 12 Pet. 213, Mr. Justice Story, delivering the opinion of the court, said: "And the question which, under this view, is presented, is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it; we are all of the opinion that it is necessary; and this is not now an open question in this court, after the decisions which have been made in Russell v. Clark, 7 Cranch 69; Edmondston v. Drake, 5 Pet. 624; Douglass v. Reynolds, 7 Pet. 113; Lee v. Dick, 10 Pet. 482; and again recognized at the present term in the case of Reynolds v. Douglass, 12 Pet. 497. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability, to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him, and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from further responsibility. The reason applies with still greater force to cases of a general letter of guaranty, for it might otherwise be impracticable for the guarantor to know to whom and under what circumstances the guaranty attached, and to what period it might be protracted. Transactions between the other parties to a great extent might from time to time exist, in which credits might be given and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the questions were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own."

In Reynolds v. Douglass, 12 Pet. 504, decided at the same term and referred to in the foregoing extract, Mr. Justice McLean stated

the rule to be "That, to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them, to the defendants, that the same had been accepted;" and added: "This notice need not be proved to have been given in writing or in any particular form, but may be inferred by the jury from facts and circumstances which shall warrant such inference."

There seems to be some confusion as to the reason and foundation of the rule and, consequently, some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise; in others it has beeen considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it as a condition of the promise of the guarantor.

The former is the sense in which the rule is to be understood as having been applied in the decisions of this court. This appears very plainly, not only from the particular consideration of the cases themselves, but was formally declared to be so by Mr. Justice Nelson, speaking for the court in delivering its opinion in the case of Mfg. Co. v. Welch, 10 How. 475, where he uses this language:

"He (the guarantor) has already had notice of the acceptance of the guaranty and of the intention of the party to act under it. The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; it is deemed essential to an inception of the contract; he is, therefore, advised of his accruing liabilities upon the guaranty, and may very well anticipate or be charged with notice of an amount of indebtedness to the extent of the credit pledged."

And in Wildes v. Savate, 1 Story 22, Mr. Justice Story, who had delivered the opinion in the case of Douglass v. Reynolds, 7 Pet. 113, after stating the rule requiring notice by the guarantee of his acceptance, said: "This doctrine, however, is inapplicable to the circumstances of the present case; for the agreement to accept was contemporaneous with the guaranty and, indeed, constituted the consideration and basis thereof."

The agreement to accept is a transaction between the guarantee and guarantor, and completes that mutual assent necessary to a valid contract between the parties. It was, in the case cited, the consideration for the promise of the guarantor. And wherever a sufficient consideration of any description passes directly between them, it operates in the same manner and with like effect. It establishes a privity between them and creates an obligation. The rule in question

proceeds upon the ground that the case in which it applies is an offer or proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete and may be withdrawn by the proposer. Frequently the only consideration contemplated is, that the guarantee shall extend the credit and make the advances to the third person, for whose performance of his obligation, on that account, the guarantor undertakes. But a guaranty may as well be for an existing debt, or it may be supported by some consideration distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt, such a consideration is necessary to support the undertaking as a binding obligation. In both these cases, no notice of assent, other than the performance of the consideration, is necessary to perfect the agreement; for, as Professor Langdell has pointed out in his Summary of the Law of Contracts (Langdell Cas. on Cont., 987), "Though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and as the want of either is fatal to the promise, the question whether an offer has been accepted can never, in strictness, become material in those cases in which a consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration."

If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows, as declared in Wildes v. Savage, supra, where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which passes at the time the undertaking is given from the guarantee to the guarantor, and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and the guarantor. For, in each of these cases, the mutual assent of the parties to the obligation is either expressed or necessarily implied.

The view we have taken of the rule under consideration, as requiring notice of acceptance and of the intention to act under the guaranty, only when the legal effect of the instrument is that of an offer or proposal, and for the purpose of completing its obligation as a contract, is the one urged upon us by the learned counsel for the plaintiff in error, who says, in his printed brief:

"For the ground of the doctrine is not that the operation of the writing is conditional upon notice, but it is, that until it is accepted and notice of its acceptance given to the guarantor, there is no contract between the guarantor and the guarantee; the reason being that the writing is merely an offer to guaranty the debt of another, and it must be accepted and notice thereof given to the party offering himself as security before the minds meet and he becomes bound. Until the notice is given, there is a want of mutuality; the case is not that of an obligation on condition, but of an offer to become bound not accepted; that is, there is not a conditional contract, but no contract whatever."

It is thence argued that the words in the instrument which is the foundation of the present action—"We hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, etc."—can not have the effect of waiving the notice of acceptance, because they can have no effect at all except as the words of a contract, and there can be no contract without notice of acceptance. And on the supposition that the terms of the instrument constitute a mere offer to guaranty the debt of Gordon & Co., we accept the conclusion as entirely just.

But we are unable to agree to that supposition. We think that the instrument sued on is not a mere unaccepted proposal. It carries upon its face conclusive evidence that it had been accepted by Wells, Fargo & Co., and that it was understood and intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. That evidence we find in the words—"for and in consideration of one dollar to us paid by Wells, Fargo & Co., the receipt of which is hereby acknowledged, we hereby guarantee, etc." How can that recital be true unless the covenant of guaranty had been made with the assent of Wells, Fargo & Co., communicated to the guarantors? Wells, Fargo & Co. had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledge.

It is not material that the expressed consideration is nominal. That point was made, as to a guarantee, substantially the same as this in the case of Lawrence v. McCalmont, 2 How. 452, and was overruled. Mr. Justice Story said:

"The guarantor acknowledges the receipt of the one dollar and is now estopped to deny it. If she had not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guarantee as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid. The very point arose in Dutchman v. Tooth, 5 Bing. (N. C.) 577, where the guarantor gave a guaranty for the payment of

the proceeds of the goods the guarantee had consigned to his brother, and also all future shipments the guarantee might make in consideration of two shillings and sixpence paid him, the guarantor. And the court held the guaranty good, and the consideration sufficient."

It is worthy of note that in the case from which this extract is taken the guaranty was substantially the same as that in the present case, and that no question was made as to a notice of acceptance. It seems to have been treated as a complete contract by force of its terms.

It does not affect the conclusion, based on these views, that the present guaranty was for future advances as well as an existing debt. It can not, therefore, be treated as if it were an engagement, in which the only consideration was the future credit solicited and expected. The recital of the consideration paid by the guarantee to the guarantor shows a complete contract, based upon the mutual assent of the parties; and if it is a contract at all, it is one for all the purposes expressed in it. It is an entirety and can not be separated into distinct parts. The covenant is single and can not be subjected in its interpretation to the operation of two diverse rules.

Of course the instrument takes effect only upon delivery. But in this case no question was or could be made upon that. It was admitted that it was delivered to Gordon for delivery to the plaintiffs below, and that Gordon delivered it to them.

But if we should consider that, notwithstanding the completeness of the contract as such, the guaranty of future advances was subject to a condition implied by law that notice should be given to the guarantor that the guarantee either would or had acted upon the faith of it, we are led to inquire, what effect is to be given to the use of the words which declare that the guarantors thereby "Guarantee unto them, the said Wells, Fargo & Co., unconditionally, at all times, any indebtedness of Gordon & Co., etc., to the extent and not exceeding the sum of ten thousand dollars, for any overdrafts now made, or that hereafter may be made, at the bank of said Wells, Fargo & Co."

Upon the supposition now made, the notice alleged to be necessary arises from the nature of such a guaranty. It is not and can not be claimed that such a condition is so essential to the obligation that it can not be waived. We do not see, therefore, what less effect can be ascribed to the words quoted than that all conditions that otherwise would qualify the obligation are by agreement expunged from it and made void. The obligation becomes thereby absolute and unqualified; free from all conditions whatever. This is the natural, obvious and ordinary meaning of the terms employed, and we can not doubt that they express the real meaning of the parties. It was their manifest intention to make it unambiguous that Wells, Fargo & Co., for any indebtedness that might arise to them in consequence of overdrafts by Gordon & Co., might securely look to the guar-

antors without the performance on their part of any conditions precedent thereto whatever.

It has always been held in this court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit, and liberally to promote the use and convenience of commercial intercourse.

This view applies with equal force to the exceptions to the other charges and refusals to charge, of the court below. These exceptions are based on the propositions:

1. That if Wells, Fargo & Co. neglected to notify the defendants below of the amount of the overdraft within a reasonable time after closing the account of Gordon & Co.; and

2. That if they failed within a reasonable time after demand of payment made upon Gordon & Co. to notify the defendants of the default, the plaintiffs could not recover upon the guaranty.

For, if the necessity, in either or both of these contingencies existed, to give the notice specified, it was because the duty to do so was, by construction of law, made conditions of the contract.

But by its terms, as we have shown, the contract was made absolute, and all conditions waived.

It is undoubtedly true, that if the guarantee fails to give reasonable notice to the guarantor of the default of the principal debtor, and loss or damage thereby ensued to the guarantor, to that extent the latter is discharged; but both the laches of the plaintiff and the loss of the defendant must concur to constitute a defense.

If any intermediate notice, at the expiration of the credit, of the extent of the liability incurred is requisite, the same rule applies. Such was the express decision of this court in the case of Mfg. Co. v. Welch (supra). An unreasonable delay in giving notice, or a failure to give it altogether, is not a bar, of itself.

We find no error in the record, and the judgment is affirmed.

BLACK, STARR AND FROST *v.* EDWARD R. GRABOW

216 *Mass.* 516, 104 *N. E.* 346 (1914).

Rugg, C. J.: This is an action upon a guaranty of the tenor following:

"Port Antonio, Jamaica, B. W. I., February 22, 1909.

"Mr. Witherby Black, care Black, Starr & Frost, New York City:

"Dear Sir—Mr. I. Percy Mills has asked me to guarantee a bill that he is incurring at your store to the amount of four hundred

dollars. I hereby do so, and if same is not paid within six months from date that upon presentation of the bill to me I will pay it.

"Yours very truly,

"E. R. GRABOW."

This letter was given by the defendant to I. Percy Mills, who in turn handed it to the plaintiff. On March 9, 1909, the plaintiff, after receipt of the letter, delivered to Mills a diamond ring for the price of $450, a credit being given him for $50. No notice was given by the plaintiff to the defendant that the guaranty had been accepted by it. Mills was in the employment of the defendant as an advertising agent at the time the letter was written. There is no evidence, however, that the defendant had any knowledge that his letter actually had reached the plaintiff, or had been accepted and acted upon by it. There is nothing to show that the plaintiff and the defendant ever had any communication with each other upon this matter before the date of the letter. The point to be decided is whether liability became fixed upon the defendant.

It was said by Hoar, J., in Whiting v. Stacy, 15 Gray 270, "The doctrine has been repeatedly announced by this court, and it must now be regarded as the settled law of Massachusetts, that, as a general rule, in order to maintain an action against a guarantor of a future contingent event, notice that the guaranty has become operative must be given in a reasonable time to the guarantor. Babcock v. Bryant, 12 Pick. 133; Bickford v. Gibbs, 8 Cush. 154, 156; Courtis v. Dennis, 7 Met. 510, 519; Clark v. Remington, 11 Met. 361, 366." The form of guaranty in that case was very similar to that in the case at bar. In Bishop v. Eaton, 161 Mass. 496, it was said by Knowlton, J., at 500, "It has been held in cases like the present, where the guarantor would not know of himself from the nature of the transaction, whether the offer had been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration. To the same effect see Schlessinger v. Dickinson, 5 Allen 47, 51; Mussey v. Rayner, 22 Pick. 223, 228; Cumberland Glass Manuf. Co. v. Wheaton, 208 Mass. 425, 431; Lascelles v. Clark, 204 Mass. 362, 376. The question now presented did not arise in Vinal v. Richardson, 13 Allen 521, or Welch v. Walsh, 177 Mass. 555.

Although it may be that there is no universal doctrine in this commonwealth that "acceptance of an offer must be communicated in order to make a valid simple contract," Lennox v. Murphy, 171 Mass. 370, 373, yet it is true that where a guaranty is in the nature of an offer and not pursuant to some previous understanding or arrangement, and no consideration is acknowledged in the instrument and none moves directly to the guarantor, and the circumstances of the parties and the transaction are not such as to indicate that knowledge of acceptance quickly will come to the guarantor,

notice of acceptance must be given within a reasonable time in order that the guarantor may be held. Allen v. Pike, 3 Cush. 238; Davis Sewing Machine Co. v. Richards, 115 U. S. 524; McIver v. Richardson, 1 M. & S. 557, 564; Mozley v. Tinkler, 1 Cr., M. & R. 692; American Agricultural Chemical Co. v. Ellsworth, 109 Maine 195.

The case at bar comes within this rule. It was an offer which, under all the attendant conditions, required notice of acceptance in order to make it a binding contract. The transaction would not warrant the presumption of a waiver of notice. The relation of the parties was not such as to support the conclusion that the defendant knew through other channels that his offer to become responsible has been acted upon by the plaintiff. The guaranty was dated in the West Indies. There is nothing in the record to show for how long a time Mills remained there, or when he returned to this country. The nature of the relation between an employer and an advertising agent is not such as to call for the inference of knowledge of the event speedily after the delivery to him of a diamond ring.

Judgment reversed.

Other cases holding that notice of acceptance is necessary are: Gardner v. Lloyd, 110 Pa. St. 278, 2 Atl. 562; Miami County National Bank v. Goldberg, 133 Wis. 175, 113 N. W. 391, 15 L. R. A. (N. S.) 1115n; Deering v. Mortell, 21 S. Dak. 159, 110 N. W. 86, 16 L. R. A. (N. S.) 352n; J. R. Watkins Medical Co. v. McCall, 116 Minn. 389, 133 N. W. 966; American Agr. Chemical Co. v. Ellsworth, 109 Maine 195, 83 Atl. 546; Asmussen v. Post Printing and Publishing Co., 26 Colo. App. 416, 143 Pac. 396; Lester Piano Co. v. Romney, 41 Utah 436, 126 Pac. 325.

Where the guaranty is given in response to a request for it by the creditor, no notice of acceptance is necessary. Stewart v. Sharp County Bank, 71 Ark. 585, 76 S. W. 1064; J. L. Mott Iron Works v. Clark, 87 S. Car. 199, 69 S. E. 227; Lester Piano Co. v. Romney, 41 Utah 436, 126 Pac. 325; Shows v. Steiner, 175 Ala. 363, 57 So. 700.

Contra: Acme Mfg. Co. v. Reed, 197 Pa. 359, 47 Atl. 205, 80 Am. St. 832; American Agr. Co. v. Ellsworth, 109 Maine 195, 83 Atl. 546.

Where the guaranty states a consideration this is sufficient to show an absolute guaranty as distinguished from a mere offer to guaranty and therefore notice of acceptance is not necessary. Davis v. Wells, Fargo & Co., 104 U. S. 159, 26 L. ed. 686; Buhrer v. Baldwin, 137 Mich. 263, 100 N. W. 468; McConnon v. Laursen, 22 N. Dak. 604, 135 N. W. 213; Bank of California v. Union Pkg. Co., 60 Wash. 456, 111 Pac. 573.

Contra: Acme Mfg. Co. v. Reed, 197 Pa. 359, 47 Atl. 205, 80 Am. St. 832; American Agr. Chemical Co. v. Ellsworth, 109 Maine 195, 83 Atl. 546.

Where the guaranty is executed contemporaneously with and as a part of the consideration for the transaction guaranteed, notice of acceptance is not required. Closson v. Billman, 161 Ind. 610, 69 N. E. 449; Cumberland Glass Mfg. Co. v. Wheaton, 208 Mass. 425, 94 N. E. 803.

Contra: American Agricultural Chemical Co. v. Ellsworth, 109 Maine 195, 83 Atl. 546.

Where notice of acceptance is required it is not necessary that such notice be given by the creditor. Knowledge is equivalent to notice from whatever source derived, if received within a reasonable time. Greer Machinery Co. v.

Sears, 119 Ky. 697, 66 S. W. 521; Asmussen v. Post Printing and Publishing Co., 26 Colo. App. 416, 143 Pac. 396; Cumberland Glass Mfg. Co. v. Wheaton, 208 Mass. 425, 94 N. E. 803.

WRIGHT *v.* GRIFFITH ET AL.

121 *Ind.* 478, 23 *N. E.* 281 (1890).

Mitchell, C. J.: Action upon a writing in the following words:

"Union City, Ind., March 17, 1882.

"Messrs. Griffith Brothers:

"Please let my daughter, Mrs. W. E. Headington, have what goods she wants and I will stand good for the money to settle the bills. You will find the pay part all right with her I think.

"Yours truly,

"Wm. Wright."

The questions presented arise on the complaint, the material averments of which are to the effect that Mrs. Headington applied to the plaintiffs to purchase millinery goods, and that the plaintiffs declined to furnish them to her on credit; that thereupon, in consideration that they agreed to sell and deliver to her from time to time on credit such goods and merchandise as she might require in her business, the defendant, her father, by the contract above set out, promised and agreed to pay for the goods so to be furnished.

It is averred that, relying upon the agreement so made, the plaintiffs from time to time sold and delivered to Mrs. Headington goods and merchandise to the amount of $2,264.56, and that there remains due them on account thereof $426.78, for which they pray judgment against the defendant.

It is contended that the complaint fails to state a cause of action, because it contains no allegation that the plaintiffs, within a reasonable time after receiving the communications above set out, notified the defendant of the acceptance of the proposal or direction therein contained.

The rule is abundantly maintained which required that upon an offer or mere proposal to become responsible for credit, which may, or may not, be extended to another, the person making the offer must be notified within a reasonable time of its acceptance in order that he may be held as a guarantor. This is so, upon the familiar principle that, while the proposition remains pending, without notice of acceptance that simultaneous concurrence of mind essential to the completion of a contract has not taken place. Furst & Bradley Mfg. Co. v. Black, 111 Ind. 308, and cases cited; Powers v. Bumcratz, 12 Ohio St. 273; Brandt Suretyship and Guaranty, § 157. "A mere offer," as has often been said, "not accepted, is not a contract, and a mere mental acceptance of a proposition, not com-

municated to the party to be charged, is not an acceptance at all in the eyes of the law." Kellogg v. Stockton, 29 Pa. St. 460; Walker v. Forbes, 25 Ala. 139 (60 Am. Dec. 498).

Where, however, the delivery of the guaranty is not a mere incipient step in the transaction, but is in fact a part, or the consummation of the contract to which it is collateral, the acceptance of the guaranty and the performance of the consideration upon which it rests are all that are essential to make the contract complete and enforceable. Snyder v. Click, 112 Ind. 293, and cases cited; Davis v. Wells, 104 U. S. 159. As has been well observed, however, "Care must be taken in all cases to mark the distinction between a consummate and perfect guaranty, and a mere proposal, or offer, or tender of guaranty, which must be accepted, and the acceptance notified to the maker, and his final assent to the engagement be obtained ere it can become a perfect and concluded contract." 3 Addison Contracts, §1115.

Mrs. Headington, so it is averred in the complaint, applied to the plaintiffs to purchase goods on credit. The application was declined. Then followed the letter of her father, in which he requested them to let her have what goods she wanted, adding, "I will stand good for the money to settle the bills." Thereupon, in reliance upon the promise contained in the letter, goods were furnished as requested. The letter was the final consummation of a pending arrangement, in pursuance of which the writer's daughter was furnished with goods.

When the contract of guaranty is executed contemporaneously with, and as a part of, the consideration for the contract or transaction guaranteed, the law imputes notice to all the parties immediately related to the transaction of its character and extent, and no further notice of the acceptance of the guaranty is required. Furst & Bradley Mfg. Co. v. Black, supra; Brandt Suretyship and Guaranty, § 164; Paige v. Parker, 8 Gray 211.

Moreover, it is an established rule, applicable to cases like the present, that, if upon a fair construction of the instrument it appears to be the personal undertaking of the guarantor to pay for goods sold, or to be sold to a third person, it will be regarded as an absolute promise or conclusive guaranty, which when acted on, makes the promisor immediately liable, and no notice is necessary of the acceptance of the guaranty. Ward v. Wilson, 100 Ind. 52 (50 Am. R. 763); Kline v. Raymond, 70 Ind. 271; Wills v. Ross, 77 Ind. 1 (40 Am. R. 279); Birdsall v. Heacock, 32 Ohio St. 177; Wise v. Miller, 45 Ohio St. 388; Powers v. Bumcratz, supra; Douglass v. Howland, 24 Wend. 35; Brandt Suretyship and Guaranty, § 167.

The contract involved in the present case is a direct engagement to pay. The language is in effect, "let my daughter have what goods she wants and I will pay the bills." As was said in Smith v. Dann,

6 Hill 543, a case parallel with the present: "But here the undertaking was absolute. The defendant said to the plaintiffs, in substance, 'if you deliver the goods, I will guaranty the payment.' We can not add a condition that the defendant shall have notice. He should have provided for that himself in the proposal made to the plaintiffs." Scott v. Myatt, 24 Ala. 489; Union Bank, etc., v. Coster, 3 N. Y. 203.

According to its terms the guaranty is not only absolute, but it is continuing. There is nothing in the letter to indicate, or from which the inference can arise, that the liability of the guarantor was to be restricted to a single transaction; on the contrary, the language, which need not be repeated, indicates that successive bills were contemplated. The rule is that unless the words in which the guaranty is expressed fairly imply that the liability of the guarantor is to be limited, it continues until the guaranty is revoked. Brandt Suretyship and Guaranty, §§ 133, 134. As we have seen, the language here is without limitation.

We find no error.

Judgment affirmed, with costs.

See also Douglass v. Howland, 24 Wend. (N. Y.) 35, 49; Smith v. Dann, 6 Hill (N. Y.) 543; Powers v. Bumcratz, 12 Ohio St. 273; Wilcox v. Draper, 12 Nebr. 138, 10 N. W. 579, 41 Am. Rep. 763; McCarroll v. Red Diamond Clothing Co., 105 Okla. 443, 151 S. W. 1012, 43 L. R. A. (N. S.) 475; Frost v. Standard Metal Co., 215 Ill. 240, 74 N. E. 139.

WILLIAM SANDERS ET AL., PLAINTIFFS IN ERROR, *v.* JOHN ETCHISON, DEFENDANT IN ERROR

36 *Ga.* 404 (1867).

The Lawrenceville Manufacturing Company, on the 1st of August, 1854, made and delivered to John Etchison their note for $380.88, due one hundred and sixty days after its date.

Subsequently, to wit: on the 7th day of February, 1855, twenty-seven stockholders of said company executed a guaranty in these words: "Georgia, Gwinnett County. We, the undersigned, stockholders of the Lawrenceville Manufacturing Company, hereby guarantee the payment of all the debts heretofore made and now outstanding against said company, and bind ourselves personally for the payment of the same, to all the creditors of the company who will not sue, but indulge the company upon their claims for ten months from this time, we to be liable to the creditors for the whole amount; but as between each other in proportion to the stock owned by each." On the 16th of August, 1856, Etchison sued the company on said note, and obtained final judgment the 17th of March, 1857.

Afterward he brought suit upon said guaranty against all of the guarantors. * * *[1]

WALKER, J.:[2] The great question in this case arises out of the construction of the instrument sued on. Much has been written on the subject of guaranty, and many cases decided involving questions connected with it. It is difficult, perhaps impossible, to reconcile all the decisions. In 2 Am. L. C., from p. 33 to p. 101, this whole subject is elaborately examined, and all the cases collated. From an examination of the decisions for the purpose of determining in what classes of cases notice of an intention to act under a guaranty must be given to a guarantor, in order to bind him; and in what classes of cases a guaranty will take effect on the doing, or forbearing, some definite thing as its consideration, perhaps the following general rule may fairly be deduced: Whenever this guaranty is not positive, but amounts to a mere offer to guaranty, if the other party will agree to accept it, or where the credit to be given, or other action, which is to be the consideration of the guaranty, is executory and uncertain as to the amount for which, or the time at which, the guarantor is to become liable—as for instance, an offer to guarantee payment for goods of uncertain kind, value or amount, to be sold at a future time—then notice of acceptance must be given to the guarantor in order to bind him. But where the undertaking of the guarantor is positive, and the amount he agrees to guaranty is fixed, and the guaranty is to take effect on the doing or forbearing some definite thing as its consideration, then no notice of acceptance is necessary; but the liability of the guarantor is fixed as soon as the consideration is completed. This is substantially the rule deduced by our brother Hull from the authorities, and we are disposed to adopt it as a correct deduction from the numerous decisions made on the subject of guaranty. In 2 Bouv. Ins. 56, the rule is laid down thus: "If the instrument does not express an absolute engagement, but a proposal or offer to guaranty, the contract is not complete until the party to whom the proposal has been made, has signified his acceptance of it. A distinction must be made between an offer to guaranty at a future time, and an absolute present guaranty. The former is not binding till accepted; the latter takes effect as soon as made. An example or two will explain this difference: 'I guaranty the payment of any goods which A. B. delivers to C. D.' is a present guaranty, and the party to whom it is given may act upon it without further communication. On the other hand, 'I have no objection to guaranty you against any loss for giving them this credit;' 'I have no objection to be answerable as far as £50. For any reference, apply to Messrs. B. & Co., of this place,' have been held as mere proposals to guaranty, and that

[1] Part of statement of facts omitted.

[2] Part of opinion omitted.

the party to whom they were severally made ought to have given notice to the maker of his acceptance." Apply these tests to this contract, and we are very clear that it is a present absolute guaranty, and the defendants are liable. Its language is, "We hereby guaranty the payment of all the debts heretofore made and now outstanding against said company, and bind ourselves personally for the payment of the same, to all the creditors of the company, who will not sue, but indulge the company upon these claims for ten months from this time." The consideration for the guaranty was indulgence of the company for ten months from that date without suit—this indulgence was given. This plaintiff was one of the class to be guaranteed—his debt was theretofore made and then outstanding against the company; the amount was fixed, and the guaranty was to take effect on the forbearance to sue, as the consideration; and therefore no notice of the acceptance of the guaranty was necessary. Such being the case, the court did right to hold defendants liable.

Judgment affirmed.

SECTION 6. CONTINUING GUARANTY

BIRDSALL *v.* HEACOCK

32 *Ohio St.* 177, 30 *Am. Rep.* 572 (1877).

The original action was brought by plaintiff in error, in the court of common pleas of Stark county, against one T. C. Heacock, as principal debtor, and the defendant in error, as guarantor, seeking to recover a balance remaining due on an account for lumber sold and delivered by plaintiff's firm to the said T. C. Heacock. The first items of the account bore date May 11, 1868, and were of the value of $226. Then follow sundry items for lumber delivered at different dates, extending down to January, 1869, and amounting in the aggregate to $2,962. Credits are given for payments, at sundry times, to the amount of $2,522. The court rendered judgment against T. C. Heacock for the balance appearing to be due on plaintiff's account. But as to the cause of action stated in the petition against the present defendant, he demurred, on the ground that the facts stated did not constitute a cause of action against him; and on this demurrer judgment was rendered in his favor.

To reverse this judgment on the demurrer, the plaintiff filed his petition in error in the district court, where the question of error was reserved for the decision of the Supreme Court.

That part of the petition which states the complaint against the present defendant, was as follows:

"And the plaintiff further says that in consideration that the firm of E. H. Potter would sell to said T. C. Heacock lumber at his request, such as he would need in the business of a builder and lumber merchant; which business said Heacock was about to engage in at the time he commenced purchasing lumber of said firm; the said Edwin Heacock did promise and guarantee in writing to said firm that he would be accountable to said firm for whatever lumber said firm might sell to said T. C. Heacock in his said business and make it all right, a copy of which guaranty is here given as a part hereof:

" 'ALLIANCE, May 11, 1868.

" 'E. H. POTTER—Please send my son the lumber he asks for and it will be all right. I had to get him to write this as I was kicked with a horse one week ago on the arm and can not more than write my name, if that. (Signed) EDWIN HEACOCK.' "

That said T. C. Heacock is the son of Edwin Heacock, and at the time of writing said guaranty and the commencement of dealing between said firm and him in said account, the said T. C. Heacock was about to engage in the business of building houses and keeping a lumber yard for the sale of lumber of all kinds, in the village of Alliance, in said county of Stark, and had no capital or credit of his own. That he expected to carry on said business through several seasons, all of which was known to the said E. H. Potter and to said Edwin Heacock, and in order to give him, said T. C. Heacock, such credit from said firm as he might desire in his said business, said Edwin Heacock executed said letter of guaranty and delivered it to his son, T. C. Heacock, who is the son mentioned therein, for the purpose of its being delivered to the firm of E. H. Potter, as a guaranty to them, and to procure credit for his son, and it was signed and executed by said Edwin Heacock, on or about May 11, 1868, and produced to said firm and delivered to it by said T. C. Heacock when he first applied to them to buy lumber. And induced by said letter, and in faith of said promise and guaranty which was then delivered to said firm in the way of his business as such builder and keeper of a lumber yard, and for reasonable prices, and on reasonable terms, agreed upon between said firm and said T. C. Heacock, said firm sold lumber to said T. C. Heacock, at different times, as shown in the foregoing account, for the purpose of enabling him to carry on his said business, in all amounting to the sum of $2,962.51, up to September 15, 1871, on which the sum of $2,522.78 has been paid, as aforesaid, and the credit and time of payment of the said lumber by said Heacock to said firm has long since expired, and yet said T. C. Heacock has not, nor has said Edwin Heacock, paid said sum yet due, nor any part thereof. And of all of said premises said Edwin Heacock had frequent notice, and yet he refuses to pay the said firm, and to this

partner, as surviving partner thereof, the said sum so due, or any part thereof, although often requested so to do.

SCOTT, J.: Counsel for defendant in error claims that the instrument of writing upon which the petition in this case bases the liability of their client is not a guaranty of any kind. The petition, however, avers that it was acted upon as a guaranty by the plaintiff's firm; and from its terms we think it was intended by the writer that it should be so understood and acted on. It is not a representation as to the solvency or pecuniary circumstances of the party about to ask credit from the plaintiff; but a request or direction that such credit should be given, and an unqualified assurance that the doing so would "be all right." The sale and delivery which it directs or requests could only be made "all right" to the plaintiff by punctual payment, according to the terms of the sale. And we think the writing imports a guaranty of such payment. It was an absolute assurance that the lumber which might be delivered to defendant's son, at his request, would be paid for.

But, within a week from the date of this guaranty, the son obtained from the plaintiff lumber to the value of $226, on the faith of this guaranty, this being the full amount that he then asked for; and this amount he has since fully paid for. The only question arising on the demurrer to plaintiff's petition is, whether the guaranty in question is a continuing one, referable by its terms to other and subsequent sales of lumber, made by plaintiff to defendant's son, or whether its terms limit it to a single transaction.

We see no good reason why contracts of warranty should not be construed by the rules applicable to the construction of contracts generally. As contracts by which the guarantor assumes the position of a surety, and becomes responsible for the default of his principal, there would seem to be good reason for not holding him liable beyond the express terms of his agreement; and, on the other hand, there can be no good reason why a guarantor, who procures a credit to be given which would have otherwise been refused, should not be held liable to the full extent warranted by the terms of the guaranty. In all written contracts, we think the language of the parties should be so construed as to give effect to their clearly ascertained intention. And, as an additional rule, we think it well settled that all contracts, in which the terms are in any respect equivocal, should be read in the light of the circumstances under which they are entered into. This is to be done, not for the purpose of varying the intention of the parties, as disclosed by the writing, but of ascertaining what the parties, in fact, meant by the doubtful language employed for the expression of their intention. The language of the guaranty in this case is, "Please send my son the lumber he asks for, and it will be all right."

There is no express limit to the quantity of lumber to be furnished. This is left to depend solely on the pleasure of the pur-

chaser. But it may well admit of doubt whether it contemplates more than a single purchase. Its language is in the present tense. And it might therefore be held that this language embraces only such lumber as the guarantor's son should ask for, upon the presentation of the guaranty. And as it contains no express reference to future transactions, such, we think, should be its construction, if read without regard to the circumstances under which it was written, or acted upon. And in support of such a construction, it is certain that many authorities, both English and American, might be cited. In order, therefore, to extend the meaning of this guaranty beyond the necessary import of its terms, the petition under consideration states that it was written and acted upon under certain circumstances which are supposed to give its language a meaning that it would not otherwise import. It is averred that the guarantor knew that his son was about engaging in the lumber business, which he expected to carry on for several seasons. But the writing contains no reference to that fact; and it is not averred that the son expected or intended to make a series of purchases of lumber from the plaintiff, and that this fact was known to the father. It is also alleged that the plaintiff, from time to time, furnished to the son the different bills of lumber stated in their account, in reliance upon this guaranty. But it is not alleged that this fact was, during this time, known to the father, or acquiesced in by him. Had such been the fact, it would be a practical construction of his contract, by the guarantor, which we might well adopt and enforce.

Looking, then, to the language of the guaranty, its operative words are: "Send my son the lumber he asks for, and it will be all right." This language clearly imports that the father knew that his son was desirous of procuring some lumber from the plaintiff upon credit. He clearly intended to procure such credit for his son by guaranteeing payment for such lumber as his son should ask for and obtain upon the presentation of the writing to the plaintiff. And we think it does not clearly import more than this. The guaranty is co-extensive with the order or direction given, and this order was fully complied with when the plaintiff, upon its presentation, sold and delivered to the son the lumber which he then asked for.

Many cases might be cited in which similar language has been confined in its interpretation to a single transaction. Whitney v. Groot, 24 Wend. 82; Gard v. Stevens, 12 Mich. 292; White v. Reed, 15 Conn. 457; Anderson v. Blakely, 2 W. & S. 237.

On the other hand, cases are not wanting in which guaranties no more comprehensive in their form of expression have, under the circumstances of the case, been construed as continuing.

Upon this subject it has been well said that "the chief difficulty lies in determining what interpretation should be put on a guaranty which is so worded that it may either extend to a series of sales or advances, or be limited to the first. The better opinion would

seem to be, that such an instrument should be confined to the immediate transaction, unless the language of the promise is sufficiently broad to show that it was meant to reach beyond the present, and render the guarantor answerable for future credits. The tendency of decision in this country has, accordingly, been against construing guaranties as continuing, unless the intention of the parties is so clearly manifested as not to admit of a reasonable doubt." 2 Am. Lead. Cas. 141, citing Congdon v. Read, 7 R. I. 576; Gold v. Stevens, 12 Mich. 292; White v. Reed, 15 Conn. 457; Whitney v. Groot, 24 Wend. 82; Webb v. Dickerson, 11 Ib. 62; Aldrick v. Higgins, 16 S. R. 213; Anderson v. Blakely, 2 W. & S. 237.

We are of opinion that the judgment of the court of common pleas should be affirmed.

Judgment affirmed.

See also Morgan v. Boyer, 39 Ohio St. 324, 48 Am. Rep. 454; Merchants & Farmers' Bank v. Calmes, 82 Miss. 603, 35 So. 161; Fellows v. Prentiss, 3 Denio (N. Y.) 512, 45 Am. Dec. 484; Cutler v. Ballou, 136 Mass. 337, 49 Am. Rep. 35.

ANDREW P. HOTCHKISS *v.* HORACE S. BARNES

34 *Conn.* 27, 91 *Am. Dec.* 713 (1867).

Assumpsit, on a guaranty given by the defendant for the payment for goods sold by the plaintiff to one J. L. Day. The following facts were found by the court:

On the 2d day of January, 1858, the defendant executed the following writing:

"Fair Haven, January 2, 1858.

"Mr. A. P. Hotchkiss:

"Sir—You can let Mr. J. L. Day have what goods he calls for, and I will see that the same are settled for. Yours truly,

"H. S. Barnes."

This writing was immediately thereafter delivered to the said Day, who was the defendant's son-in-law, and by him to the plaintiff, and upon the faith and credit thereof the goods described in the bill of particulars were delivered to Day between the 2d of January, 1858, and the 26th day of July, 1859. The plaintiff was a merchant engaged in the wholesale grocery business in the city of New Haven, and Day was a druggist in Fair Haven. The goods purchased were such as he would use in his business. The defendant had due notice of the acceptance of the guaranty by the plaintiff, and during the time while the goods were being furnished to him he was frequently in the plaintiff's store, and had knowledge

of the kind of goods Day was purchasing, the extent of the indebtedness therefor, and that the goods were being furnished upon the credit of the guaranty. Shortly before the date of the last item in the bill of particulars the defendant went to the West Indies, where he remained until the next summer, and until after the maturity of the note to be mentioned. On the 30th day of March, 1860, and during the defendant's absence, and without notice to him, the plaintiff in making up his account with Day, as was his custom with all who traded with him, balanced the account and took Day's note for the balance at three months. On the 30th of May, 1860, Day, who up to that time had been carrying on the druggist business, disappeared with all the goods in his store and became utterly insolvent. On the same day the plaintiff caused to be left at the residence of the defendant written notice to the effect that Day had become insolvent and that he should look to the defendant for the payment of his indebtedness to him; and upon the maturity and nonpayment of the note, he caused a like notice, and to the same effect, to be left at the defendant's residence. Shortly after the maturity of the note, and upon the return of the defendant from the West Indies, the plaintiff presented the note to him and he promised to pay it. On the 13th of August, 1860, another demand was made upon him by the plaintiff, in reply to which he said that it was all right and that he would pay it as soon as he conveniently could. A third demand was made by the plaintiff on the 6th of February, 1861, in reply to which the defendant said that he would pay it in cash in two months from that time.

The plaintiff objected to evidence as to the giving of the note by Day as not admissible under the plea and notice; also to all the other evidence, so far as it was offered for the purpose of affecting the construction of the guaranty, as tending to vary or contradict a written instrument; but the court admitted the evidence. The defendant also claimed that the guaranty was not a continuing one, and that he was not liable upon it for any goods sold after the first sale, which took place on the 2d day of January, 1858; also that he was not liable upon the guaranty for such part of the goods sold as consisted of spirituous liquors; but the court overruled both claims, and rendered judgment for the whole amount of his claim.

The defendant moved for a new trial for error in the rulings of the court, and also filed a motion in error.

PARK, J.: This suit is based upon the following letter of credit addressed by the defendant to the plaintiff:

"FAIR HAVEN, January 2, 1858.

"Mr. A. P. Hotchkiss:

"SIR—You can let Mr. J. L. Day have what goods he calls for, and I will see that the same are settled for. Yours truly,

"H. S. BARNES."

The first question in controversy between the parties is, whether this instrument is a continuing guaranty or whether it applies only to the first item in the plaintiff's bill.

The books are full of reported cases upon the subject of commercial guaranties. The decisions are not uniform in the conclusions arrived at, from the fact that no two cases can be found precisely alike, and different courts have adopted different rules of construction. In some of them a rigid rule has been applied to the guarantors, while in others a construction has been given most favorable to them. It was well said by Parke, J., in the case of Hargreave v. Smee, 6 Bingham 244, "that all these cases must be decided each on its own ground, and therefore it is useless to refer to the decisions except for any principle which may be incidentally laid down in them." In relation to the rule that should govern courts in construing contracts of this description, the weight of authority, gathered from all the cases upon this subject, is in conformity to the rule of construction adopted by our own court, that the contract of a surety must be construed according to the intent of the parties. In the case of Hall v. Rand, 8 Conn. 560, Ch. J. Hosmer says: "The real inquiry is, what was the intention of the defendant, and to ascertain this his words must be taken in their plain, popular and obvious sense. That is the true meaning of the contract which readily presents itself to a plain man of common understanding on reading it attentively and impartially, and not that which is elaborated with effort." In the case of Lewis v. Dwight, 10 Conn. 100, Ch. J. Williams says: "The contract of a surety must, like all contracts, be construed according to the intent, and the question is, what is the fair import of the language of the guaranty." In the case of White v. Reed, 15 Conn. 457, Hinman, J., adopts the same rule of construction. This rule may also be found in Hargreave v. Smee, supra; Lee v. Dick, 10 Peters 482, and 2 Kent Com. 557.

Applying this rule to the case in question, would the fair import of the language used in this guaranty be satisfied by the purchase of a few articles of merchandise at one time? Suppose Day had casually passed the store of the plaintiff immediately after the guaranty had been given, and recollecting that he needed an article for a particular purpose, an article not usually kept by druggists of a limited business, had procured it, would the liability of the defendant be exhausted by the purchase of the article?

The language of the guaranty is, you can let Day have what goods he calls for. There is no limitation of the quantity or kind of goods that he may purchase. There is no limitation of the amount in value that the plaintiff may sell. The language is general—"what goods he calls for." The guaranty shows that the defendant was willing to trust Day to any amount, or else some limitation would have been made in the amount he might purchase. Even the defendant's con-

struction placed it in the power of Day to ruin the defendant in a single transaction. Now it is unreasonable to suppose that the defendant intended to limit Day to a single purchase of goods under such circumstances. Had he intended to limit his authority, we should look for a limitation in the amount rather than in the number of sales.

We are therefore inclined to think that a fair construction of this guaranty shows it to be a continuing one. But if we are wrong in this, the only other result to which the case tends is equally unfavorable to the defendant. It must be conceded that the language of this guaranty accords as well with sales made from time to time as it does with the first purchase of goods. Now if it is capable of either construction, and both are in harmony with the language used, then the guaranty possesses a latent ambiguity, and where that is the case the extrinsic circumstances may always be shown in order to ascertain which construction the parties intended the instrument to have. Brown v. Brown, 4 Conn. 269; Lines v. Flagg, id. 581; Strong v. Benedict, 5 id. 210; Brown v. Slater, 16 id. 192; Baldwin v. Carter, 17 id. 201; Peisch v. Dickson, 1 Mason 9; The King v. Inhabitants of Laindon, 8 T. R. 379; Ely v. Adams, 19 Johns. 313; Bailey v. Larchar, 5 R. I. 530; 1 Greenl. Ev., p. 288; 1 Swift Dig. 182.

Should we consider the guaranty aided by these circumstances, we can have no doubt that the parties intended the guaranty to be a continuing one.

The plaintiff was a merchant engaged in the wholesale grocery business in the city of New Haven and Day was a druggist in the village of Fair Haven. The goods purchased were adapted to the line of business Day was pursuing. The defendant was frequently in the plaintiff's store during all the time the goods were being delivered, and had knowledge of the kind of goods purchased, and the amount thereof, together with the fact that they were furnished upon the credit of his guaranty. He made no complaint at any time, and, after the indebtedness had fully accrued, promised to pay the amount on three different occasions.

It is difficult to see what could more satisfactorily show the construction the parties put upon the guaranty. The plaintiff sold the goods upon the credit of the guaranty. This shows in what sense he understood the contract. The defendant knew of the purchases, and made no complaint, and afterward repeatedly promised to pay the amount. This shows that he regarded the guaranty as a continuing one.

Both parties then understood the contract in the same sense, and such must be its construction.[1] * * *

[1] Part of opinion relating to illegality omitted.

There is no error in the judgment complained of and no ground for a new trial.

In this opinion the other judges concurred.

See also Mason v. Pritchard, 2 Camp. 436; Mayer v. Isaac, 6 M. & W. 605; Frost v. Standard Metal Co., 215 Ill. 240, 74 N. E. 139; First Nat. Bank v. Waddell, 74 Ark. 241, 85 S. W. 417; Mawry v. Waxelbaum Co., 108 Ga. 14, 33 S. E. 701; Gates v. McKee, 13 N. Y. 232, 64 Am. Dec. 545.

THE MERCHANTS NATIONAL BANK *v.* COLE.

83 *Ohio St.* 50, 93 *N. E.* 465, *Ann. Cas.* 1912A, 779 (1910).

The facts are stated in the opinion.

SUMMERS, C. J.: The Merchants National Bank of Toledo, Ohio, sued the defendant, Louis M. Cole, as administrator of the estate of Lucy A. Cole, to recover upon the following guaranty:

"March 29, 1908.

"I hereby guarantee the payment of all notes of F. E. & G. H. Cole held by the Merchants National Bank, also all renewals of same, or any new loans made to either F. E. or G. H. Cole by the said bank. LUCY A. COLE."

The answer of the defendant, with other matter, sets up the following:

"That said guaranty was given by her for and on account of loans already made, and thereafter to be made by said bank to said F. E. and G. H. Cole for and on account of work being then done and performed by them in the city of Toledo, Ohio, under contracts with the said city of Toledo, Ohio, and for no other purpose whatsoever; that at the time said paper was executed the said F. E. and G. H. Cole were engaged in the work of paving streets and building sewers in the city of Toledo, under contracts with the said city, and have been so engaged for a long time prior thereto, and were, and had been doing business with said bank, and had borrowed money from said bank to be used in the prosecution of said work, and were at said date indebted to said bank in the sum of thirteen thousand two hundred dollars ($13,200), as evidenced by their promissory notes, for money so borrowed, and on said day applied to said bank for a further loan, the proceeds to be used in the prosecution of said work, and thereupon the said bank demanded of them that their mother, the said Lucy A. Cole, should guaranty the payment of said loans, and thereupon said paper was prepared by one of the officers of said bank and taken to said Lucy A. Cole by one of her sons, and signed by her, and it was not intended or con-

templated, either by said bank or said Lucy A. Cole, that such guaranty should apply to any loans made by said bank to said F. E. and G. H. Cole, or either of them, other than loans made for and on account of work done under said contracts with the said city of Toledo.

"The said bank had full knowledge of the character of the work in which the said F. E. and G. H. Cole were engaged, and full knowledge of the place or places where said work was being carried on, and of the purposes for which said money was borrowed and used.

"The indebtedness from F. E. and G. H. Cole to the bank, existing on March 29, 1898, and all loans made by said bank to said F. E. and G. H. Cole, or either of them, after said date, for or on account of said contracts, have all long since been paid in full.

"About the 1st of January, 1901, the said F. E. and G. H. Cole had substantially completed all of the work they had contracted to do in Toledo, under contracts with the said city, and no contracts were ever entered into between them and the said city of Toledo thereafter. All loans made by said bank to said F. E. and G. H. Cole, or either of them, for or on account of any work done in Toledo, or any contracts with the city of Toledo, have been fully paid.

"In the summer of 1901 the said F. E. and G. H. Cole entered into a contract for the construction of a tunnel, or a section thereof, in Philadelphia, Pa., and in September, 1902, they entered into a contract for tunnel work in Dossett, Tenn.

"Defendant further says that the bank loaned the said F. E. and G. H. Cole certain sums of money for and on account of said last two above-mentioned contracts, all of which loans were evidenced by promissory notes, and that whatever notes said bank now holds against the said F. E. and G. H. Cole were given for moneys borrowed by them on account of the said Philadelphia and Dossett contracts.

"The said bank had full knowledge of these contracts and the nature of the work being done under them, and made the loans last above referred to with express reference to said contracts, and with full knowledge that the money was being borrowed for the purpose of being used in the prosecution of the work under said contracts, and without consultation with or notice to said Lucy A. Cole.

"All the said notes now held by said bank are dated February 15, 1904, and are all renewal notes, none of them having been given for loans made at the time they were executed, but all given in lieu of prior notes. The last loan made by said bank to said F. E. and G. H. Cole, or either of them, was made prior to July, 1903. The notes given for the loans now represented by these notes were from time to time renewed, and the times of payment of the said loans extended by said bank without notice to the said Lucy A. Cole, and without knowledge on her part.

"No demand was ever made on said Lucy A. Cole for payment of any part of the indebtedness of the said F. E. and G. H. Cole to said bank, nor was any notice ever given her as to the amount or condition of said indebtedness, nor did she ever have any knowledge of any extension of the time or times of payment of any part of said indebtedness, nor did she ever have any knowledge that the said F. E. and G. H. Cole had borrowed any money from said bank for or on account of said Philadelphia or Dossett contracts, or either of them, prior, at least, to October, 1903, and she had no knowledge of the execution of the renewal notes now held by said bank, and hereinbefore referred to."

Upon motion, that part of the answer was stricken out and after trial a judgment was entered for the bank.

The circuit court reversed the judgment for error in sustaining the motion.

Counsel for the bank contend that this guaranty is an unlimited and continuing guaranty, that it is in no respect equivocal or ambiguous, and that to permit proof of the circumstances set up by the answer would be to permit the written contract to be modified by parol evidence.

An unlimited guaranty may be defined as one that is unlimited both as to time and amount, and a continuing guaranty is one that is not limited in time or to a particular transaction or to specific transactions, but is operative until revoked.

This guaranty is not limited by its terms, nor is it by its terms continuing. The courts are not in accord as to the rule to be applied in the interpretation of guaranties. In some cases it is held that a guaranty is to be strictly construed in favor of the guarantor, in others that it is to be liberally construed in favor of the creditor. The Hartwell & Richards Co. v. Moss, 22 R. I. 583. In this state it is settled that, "A guarantor, like a surety, is bound only by the express terms of his contract. The language used is to be understood in its plain and ordinary sense, as read in the light of the surrounding circumstances, the situation of the parties, and the object of the guaranty, and that construction given which most nearly conforms to the intention of the parties. If the language is equally capable of each construction, the one will be adopted which construed it to be limited, and not the one which construed it to be continuing." Morgan v. Boyer, 39 Ohio St. 324; Hall v. Hall, 32 Ohio St. 184; The Cambria Iron Co. v. Keynes et al., 56 Ohio St. 501.

But counsel contend that the rule adopted in these cases is applicable only when the instrument is equivocal or ambiguous, and that here the fair and natural meaning of the words clearly imports that the guaranty was intended to be continuing. We do not understand that these cases except such instruments from the general rule that parol evidence is inadmissible to limit or to enlarge the

terms of a written instrument, but that they hold that an unlimited guaranty is equivocal or ambiguous in respect to being continuing in the absence of words that clearly import such an intention.

In such cases the instrument is to be construed in the light of the surrounding circumstances, but this does not mean, as some cases would seem to indicate, that the written instrument is to be supplanted by a new contract evolved by the court from the parol evidence. Attention should be given to what is meant by surrounding circumstances, and it should be remembered that they may not be used to contradict or vary the terms of the instrument. In The Cambria Iron Co. v. Keynes et al., 56 Ohio St. 501, it is held: "In construing a contract of guaranty, the object should be to ascertain the intention of the parties; and, as in construing all contracts, the words employed by the parties should be construed in the light afforded by the circumstances surrounding them at the time it was made." Monnett v. Monnett, Admr., 46 Ohio St. 30, holds that oral testimony is not admissible to contradict or vary the terms of written agreements, but is admissible to prove the circumstances under which they were made, to enable the courts to put themselves in the place of the parties, with all the information possessed by them, the better to understand the terms employed in the contract, and to arrive at the intention of the parties.

In Morrell v. Cowan, 7 Ch. Div. (L. R.) 151, where the court construed a guaranty reading as follows: "In consideration of you having at my request agreed to supply and furnish goods to C. (her husband), I do hereby guarantee to you the sum of £500. This guarantee is to continue in force for the period of six years and no longer," it was held that the guaranty was limited to goods actually supplied to the husband after it was given. Thesiger, L. J., in his opinion says: "I agree that in determining the construction of this instrument the court is entitled to look at the surrounding circumstances; that is to say, it is entitled to consider, first, who the parties were; secondly, in what position they were; and, thirdly, what the subject-matter of the agreement was. Now we find that Morrell was a leather factor, and that Cowan was a shoe manufacturer, and was indebted to him for certain goods supplied to him in the way of trade. Cowan was anxious to get a further supply, which Morrell was willing to furnish if he had a guaranty from Mrs. Cowan, who had separate estate. To these circumstances we may look, but we can not go further. It is not open to the parties to show that there was a parol bargain that Mrs. Cowan should guarantee her husband's past debts, or that the guarantee should be confined to future debts; that question must rest upon the written instrument alone."

It follows that the court of common pleas erred in not permitting

a statement of any of the surrounding circumstances that the circuit court was not in error in reversing the judgment on that ground.

Judgment affirmed.

Crew, Spear, Davis and Price, JJ., concur.

But see McShane Co. v. Padian, 142 N. Y. 207, 36 N. E. 880.

LIMITATION AS TO AMOUNT.

"If a bond is given by a surety to secure the repayment of advances of money to the principal, provided such advances do not exceed on the whole at any one time a certain limited amount, the proviso protects the surety from being answerable beyond the amount named, but does not render the obligation void if the advances go beyond it, unless that clearly appears to have been the intention of the parties." Bank of New Zealand v. Wilson, 5 N. Z. 215; Parker v. Wise, 6 M. & S. 239; Laurie v. Scholefield, L. R. 4 C. P. 622; Fisk v. Stone, 6 Dak. 35, 50 N. W. 125; Curtis v. Hubbard, 6 Metc. (Mass.) 186; Tolerton & Stetson Co. v. Barck, 81 Minn. 470, 84 N. W. 330; Clagett v. Salmon, 5 Gill & J. (Md.) 314; Sheppard v. Daniel Miller Co., 7 Ga. App. 760, 68 S. E. 451.

Contra: Bloomington Mining Co. v. Searles, 63 N. J. L. 47, 42 Atl. 840; Ryan v. Trustees, 14 Ill. 20; Farmers & Mechanics' Bank v. Evans, 4 Barb. (N. Y.) 487.

SECTION 7. GUARANTY OF COLLECTIBILITY

W. J. EVANS *v.* W. H. BELL

45 *Tex.* 553 (1876).

Bell sued Evans on a promissory note, and to enforce the vendor's lien on lands for which the note was executed, of date December 13, 1871, and due in twelve months.

Evans pleaded in set-off a note executed July 7, 1871, to Bell, and by him indorsed by writing at the bottom of the note his guaranty, as follows: "I, W. H. Bell, do herein agree, that if the bearer fails to collect the above amount by 1st of April, that I will be responsible for it.

"(Signed) W. H. BELL."

On the trial the note pleaded in set-off was excluded. Judgment was rendered for plaintiff for the amount claimed by him. The defendant Evans appealed, assigning as error the ruling of the court in excluding his testimony.

MOORE, ASSOCIATE JUSTICE: The only error assigned for the reversal of the judgment in this case is, the ruling of the court excluding from the jury the instrument described in the answer, and pleaded as an offset to appellee's action.

It is not pretended that this instrument has any connection whatever with the demand upon which the action is brought. The answer setting it up must therefore be regarded as in the nature of a

cross-action, and should contain such allegations as would entitle the defendant to a judgment if he was prosecuting a suit on it as plaintiff. (Waterman on Set-off, p. 45, § 40, and p. 89, § 73.) It is a familiar rule, that where a party wholly fails by his petition or answer to state a cause of action or ground of defense, he has no occasion to complain because the court has excluded evidence tending to prove the matters alleged in his petition or answer. The answer in this case is framed upon the hypothesis of appellee's immediate and unconditional liability for the payment of the note herein described, if not paid by the time mentioned in his transfer of it, written immediately beneath the signature of the maker. The controversy, therefore, in this case turns upon the legal effect of this transfer, and whether it in fact imports an absolute and direct, or a collateral undertaking on the part of appellee.

There seems considerable conflict between the decisions of the courts of different states in construing contracts and agreements such as that here in question. It is not necessary, however, on the present occasion, to determine whether the appellee became a mere indorser of the note, with a qualification of his liability as indorser in point of time, as he insists, or, as appellants maintain, his undertaking is that of guarantor. For, conceding that it is the latter, it must be admitted that there is a plain and broad distinction between the guaranty of the payment of a note or bill, and the guaranty of its collection. The guarantor in the latter case is not liable to an action on the mere failure of the debtor to pay the note when due, for he merely stipulates thereby that the note is collectible in due course of law by use of reasonable diligence. An undertaking indorsed upon the note by the payee in these terms, "I warrant this note good," was held by the Supreme Court of New York to be a guaranty that the note was collectable, and not that it would be paid on demand. And in order to charge the guarantor it was held necessary to show that payment could not be enforced against the maker. (Curtis v. Smallman, 14 Wend. 231.) And when the stipulation was, "I guarantee the collection of this note," it was decided that the guarantor was not liable until after the holder had endeavored to collect the money from the maker. It was equivalent, say the court, to a guarantee that the note was collectable by due course of law. (Cumpston v. McNair, 1 Wend. 457; see also Day v. Elmere, 4 Wis. 190; Hart v. Hudson, 6 Duer. 294; Loveland v. Shephard, 2 Hill 139.) And where the payee transferred the note with this indorsement, "I hereby guarantee this note good until January 1, 1850," the Supreme Court of Vermont held that the contract of the defendant was collateral and not absolute; that by this guaranty the defendant agreed that during the period mentioned in the guaranty the maker of the note should be in that condition that its payment could be enforced if legal diligence should be used for its collection. And to maintain an action on this guar-

anty, it was held that it was necessary to aver that the maker was not before, nor on the day mentioned in the guaranty, good or responsible for the note, but on the contrary that it was uncollectable from the maker. (Hammond v. Chamberland, 26 Vt. 406.) In this case appellee agreed to be responsible for the note, "if the bearer fails to collect it," not on the day it became due, but by the first of April thereafter; by which time it evidently is possible that it might have been collected by the prompt and diligent use of legal process. Unquestionably, appellant's undertaking of responsibility was not unconditional, but was dependent on some effort to collect. It is equally unquestionable that this effort could only have been made by the bearer of the note. But no effort whatever is alleged in the answer to have been made for its collection. Appellee's liability is rested upon the bare fact that the note was unpaid. This, as we have seen, is insufficient. The introduction of the note, which is all the evidence for which a predicate was laid in the answer, was not sufficient to establish appellee's liability for its payment; and appellant could therefore have suffered no injury from its exclusion. The judgment is affirmed.

Affirmed.

Accord: Cowles v. Peck, 55 Conn. 251, 10 Atl. 569, 3 Am. St. 44; Jones v. Ashford, 79 N. Car. 172.

ALFRED W. McMURRAY ET AL., EXECUTORS, *v.* STEPHEN R. NOYES

72 *N. Y.* 523, 28 *Am. Rep.* 180 (1878).

Rapallo, J.: The guaranty on which this action is brought is contained in an assignment of a bond and mortgage, and is in the following form:

"I hereby covenant * * * that in case of foreclosure and sale of the mortgaged premises described in said mortgage, if the proceeds of such sale shall be insufficient to satisfy the same, with the costs of foreclosure, I will pay the amount of such deficiency to the said party of the second part, or its assigns, on demand."

On the part of the appellants, it is contended that this guaranty is subject to the rules applicable to guaranties of collection, and thus laches in foreclosing the mortgage, after default, is a defense. The respondents insist that it is a guaranty of payment, and that they were under no obligation to use diligence in endeavoring to collect the mortgage debt by foreclosure.

The fundamental distinction between a guaranty of payment and one of collection is, that in the first case the guarantor undertakes unconditionally that the debtor will pay and the creditor may, upon default, proceed directly against the guarantor, without taking any

steps to collect of the principal debtor, and the omission or neglect to proceed against him is not (except under special circumstances) any defense to the guarantor; while in the second case the undertaking is that if the demand can not be collected by legal proceedings the guarantor will pay, and consequently legal proceedings against the principal debtor, and a failure to collect of him by those means are conditions precedent to the liability of the guarantor; and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor.

These rules are well settled, and are not controverted, and the only question is to which class of guaranties the one now before us belongs.

It is apparent upon the face of the instrument that the undertaking of the defendant was not an unconditional one that the mortgagor should pay, or that the guarantor would pay on default of the mortgagor, but only that the guarantor would pay, in case of a deficiency arising on a foreclosure and sale. The foreclosure and sale were consequently conditions precedent, and the general principle is, that wherever a condition precedent is to be performed for the purpose of establishing the liability of a surety or guarantor, such condition must be performed in good faith and with due diligence. It is upon this principle that, in case of a guaranty of collection diligence is required of the creditor.

I am unable to see why this principle is not applicable to the guaranty now in controversy. The respondents claim that it is an undertaking to pay any deficiency which may arise, and is, therefore, a guaranty of payment of the mortgage debt to that extent, and to be governed by the same rules as if it had been a guaranty of payment of the whole mortgage. But the fallacy of this reasoning is that it is not an unconditional guaranty that the mortgagor will pay the mortgage debt, or any part of it, but only that after the remedy against the land has been exhausted, and the deficiency ascertained by foreclosure and sale, the guarantor will pay such deficiency. The only difference between this and an ordinary guaranty of collection is that in the latter case the undertaking is that after it has been ascertained by all such legal proceedings as the case admits of that the demand can not be collected, the guarantor will pay; while in the present case the only proceedings which the creditor is bound to adopt are a foreclosure of the mortgage and sale of the mortgaged lands. To that extent the condition precedent exists alike in both cases, and the duty of exercising due diligence attaches, there being nothing in the instrument qualifying or dispensing with it.

The case of Goldsmith v. Brown, 35 Barb. 484, is relied upon by the respondents as sustaining their position. In that case the covenant was, as construed by the court, to pay the deficiency upon the

mortgage debt whenever the remedy against the lands mortgaged should have been exhausted and the deficiency ascertained. The decision in that case can only be sustained by construing the covenant as waiving diligence in foreclosing, and binding the covenantor to pay the deficiency without regard to the time of the foreclosure. Nothing in the covenant now under examination has any relation to the time of the foreclosure, or can be construed as waiving the diligence required by the general rules of law in performing the condition.

The delay in foreclosing in the present case was fourteen months after the mortgage debt became due. During upward of this time the property was a sufficient security, but afterward the buildings thereon were destroyed by fire, and the value was reduced below the amount of the mortgage debt. It can not be questioned that this delay was sufficient to constitute laches. In Craig v. Parkis (40 N. Y. 181), a delay of six months in foreclosing a bond and mortgage was held to be laches which discharged a guaranty of its collection.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

Judgment reversed.

All concur.

JOHN CRAIG, APPELLANT, *v.* JAMES PARKIS, RESPONDENT.

40 *N. Y.* 181, 100 *Am. Dec.* 469 (1869).

The action was upon a guaranty.

August 18, 1857, Frederick Root executed his bond, and a mortgage, on land in Badaxe county, Wisconsin, to Willard Herrick, to secure the sum of $300 and interest, in three equal amounts, annually.

The first payment November 1, 1858.

The second payment to be made November 1, 1859.

The third payment November 1, 1860.

On the 24th of August, 1857, E. H. Burgess, by a writing, indorsed on the bond, guaranteed the payment of the bond and mortgage. On the same day, Willard Herrick assigned the bond and mortgage to the defendant, James Parkis, and guaranteed their payment, by a writing, indorsed on the bond. August 28, 1857, James Parkis, the defendant, assigned the bond and mortgage, and guaranteed the collection of the same to Orson Tousley, by the following writing, indorsed on the mortgage:

"For value received, I hereby sell, assign, and set over to Orson

Tousley, all my right, title, and interest to the within mortgage, and the bond accompanying the same, and hereby guaranty the collection of the within amount, as it becomes due, waiving all notice. Dated Albion, August 28, 1857. (Signed) JAMES PARKIS."

This action was commenced upon this last guaranty. On the 3d of January, 1859, Orson Tousley assigned the said bond and mortgage to A. J. Cady, and, on the 1st of January, 1859, Cady assigned the same to the plaintiff, neither assignment in terms carrying with it the defendant's guaranty. April 5, 1859, an action was commenced against Willard Herrick, upon his guaranty, and judgment recovered, for penalty in the bond, execution to collect $141.19, which was returned unsatisfied. No execution has since been issued.

On the 15th day of November, 1859, action was commenced to foreclose said mortgage. Judgment was obtained May, 1860, for $254.46, and $30.95 costs. It appeared, by the record, that personal service was not made on Frederick Root. The premises were sold October 1, 1860, for $28.90; the fees and expenses of sale were $27.90; and the deficiency on the sale was $291.42, for which execution was issued in Wisconsin, and returned unsatisfied. Frederick Root resided in Orleans county, New York.

May 13, 1861, an action was commenced against Frederick Root, upon said bond. Judgment recovered July 6, 1861. Execution issued and returned unsatisfied, May 4, 1861. Action commenced against E. H. Burgess upon his guaranty judgment recovered July 6, 1861, and execution issued and returned unsatisfied. To excuse the delay in prosecuting the foregoing obligation, the plaintiff, before resting his case, offered to prove that Root, Herrick and Burgess were, and had been, since the first payment became due, utterly and hopelessly insolvent, and that nothing could have been collected of them, by proceedings at law. This was objected to, the objection sustained, the evidence excluded, and the plaintiff excepted.

The plaintiff was nonsuited.

LOTT, J.: The defendant, by assignment, bearing date the 28th day of August, 1857, assigned to Orson Tousley a mortgage on real estate, in the state of Wisconsin, and the bond accompanying the same, executed by Frederick Root to Willard Herrick, and guaranteed the collection of the amount, secured thereby, as it became due, waiving all notice.

The bond and mortgage bear date the 18th day of August, 1857, and were given to secure the payment of the sum of three hundred dollars, with interest, in three equal annual payments of one hundred dollars each, with interest; the first of which was to be made on the 1st day of November, 1858. Indorsed on the bond was a guaranty by G. H. Burgess, dated August 24, 1857, guaranteeing

the payment thereof; and the said Willard Herrick, by an assignment of the last mentioned date, assigned the bond and mortgage to James Parkis, the defendant, or bearer, and also guaranteed the payment thereof. The said bond and mortgage, and all the right of Tousley in them, were afterward assigned by him, on the 3d day of January, 1859, to A. L. Cady, and he assigned them, and all money due and to grow due thereon, as collateral security for a debt due from him to the plaintiff, by assignment dated February 1, of the same year.

On the fifth day of April following, the plaintiff commenced an action in the Supreme Court of this state against Herrick, on his guaranty, which was duly prosecuted to judgment, and an execution issued thereon, was returned wholly unsatisfied.

Subsequent to the return of the execution, and on the 15th day of November, 1859, a suit for the foreclosure of the mortgage was commenced in the circuit court of the state of Wisconsin against Frederick Root, in which a decree for the sale of the mortgaged premises and for the payment of any deficiency was entered, on the 10th day of May, 1860.

The property was sold on the 1st day of October, 1860, and the sum of one dollar, over and above the costs, was realized from such sale and credited on the decree.

An execution for the collection of the deficiency was issued, on the 4th day of December, 1860, and afterward returned wholly unsatisfied. On the 4th day of May, 1861, an action was commenced by the plaintiff, in the Supreme Court of this state, against the said Burgess, on his guaranty, in which judgment was rendered on the 6th day of July thereafter, for the whole amount payable on the said bond, and on the 13th day of the month of May, an action was commenced by the plaintiff, in the Supreme Court of this state, against Frederick Root, the mortgagor, in which judgment was also recovered, on the said 6th day of July, for the whole amount due. Executions on both of the last mentioned judgments were issued on the 9th of the month, and were each returned wholly unsatisfied, before the commencement of the present action.

After these facts were proven, the plaintiff offered to prove that, at the time the first instalment of the bond became due, November 1, 1858, the said Frederick Root, William Herrick and E. H. Burgess were and have ever since been, each of them, entirely and hopelessly insolvent, and that nothing could have been collected of them, by proceedings at law then or since.

The court excluded that evidence, and then, no further evidence being introduced, a nonsuit was ordered.

The motion for the nonsuit was based on three grounds:

1. That the proofs did not show the guaranty in the suit to be owned by the plaintiff.

2. That it did not appear that the plaintiff had used due and proper diligence, in the prosecution of the principal debtor, and the several guarantors.

3. That there were not sufficient facts stated in the complaint to constitute a cause of action.

The first ground for the nonsuit will be first considered. Although the guaranty of the defendant was not, in terms, assigned to the plaintiff, he became entitled to the benefit of it, under the assignment of the bond, and the money secured thereby. The transfer of the debt to him carried with it, as an incident, all the securities for its payment. He, therefore, had a right to maintain the action.

The exception to the exclusion of the evidence offered, and the other grounds of the motion for a nonsuit, present, substantially, the same question, and that involves the construction of the defendant's contract.

He guaranteed the collection, and not the payment, of the amount secured by the bond and mortgage, when it became due.

The mere fact of its nonpayment, at that time, was, therefore, not sufficient to give the plaintiff the right of action. He was bound to take proper measures to collect the debt, within a reasonable time after the whole of it became payable, conceding, for the present, that such duty did not arise on the previous defaults.

His obligation will be first considered, on the assumption that all of the parties liable were then able to pay, and that such liability continued for six months thereafter.

The last instalment became payable on the 1st day of November, 1860, and legal proceedings could have been immediately taken against Root the obligor, on his bond, and against Burgess and Herrick, the previous guarantors, on their guaranty of payment. None were, however, taken, until in May, 1861, and then only against Root and Burgess.

A judgment had previously been recovered against Herrick for the penalty of the bond, after default was made in the payment of the first instalment, and assuming that no further suit against him was necessary, that did not dispense with the necessity of issuing an execution, after the other instalments became payable.

It also appears, by the case, that all of the debtors, at the time of the recovery of the judgment, and the issuing of the executions against them, resided in this state, and there is nothing to show that either of them was, at any time, a nonresident, or that a suit could not have been commenced against them, by a personal service of the summons. A delay for upward of six months was, under the assumption of the solvency of the parties, not the exercise of proper and due diligence.

Does their insolvency excuse that delay?

I see no principle upon which that can be claimed.

When a creditor agrees with a surety for his debtor, that he will commence a suit against such debtor within a reasonable time after the debt falls due, and, in default thereof, that the surety shall be released, it is a condition precedent to his right of action against the guarantor, that such suit shall not only be so commenced, but that it shall be carried to consummation.

The plaintiff had no right to determine, on his own responsibility, whether the debt was collectible. That was a question which the defendant had made it incumbent on him to ascertain, by recourse to the ordinary rules provided by the law for the collection of debts.

If the debtor's insolvency is an excuse for the delay, at all, there is no reason why it should not be such, as long as the insolvency continues, and thus the liability of the surety would be, for an indefinite period, controlled by the opinion of witnesses as to the ability of the principal to pay the debt, and not by the standard, or means, fixed by the parties themselves, for ascertaining that fact.

These views lead us to the conclusion that the proof of the debtor's insolvency was properly rejected.

It follows, therefore, that the nonsuit was proper, and that the judgment should be affirmed, with costs.

Mason, J. (dissenting): There has been a very great deal of discussion, in the courts of this country, as to the legal construction of such a guaranty as this. The real difference of opinion has been as to what was implied in such a guaranty. All agree that, unless the terms of the guaranty imply that the liability of the guarantor depends upon the failure to obtain payment of the principal, by proceedings at law, such proceedings are not a condition precedent. In most states it has been regarded as an undertaking to pay, if recompense could not be obtained of the principal debtor; and that, where clear proof of the principal debtor's insolvency could be made, no suit against him was required. The following cases will be found to hold this: McDoal v. Yeomans, 8 Watts R. 361; McClurg v. Fryer, 15 Pa. St. R., 3 Harris 293; Bull v. Bliss, 30 Vt. R. 127; Dana v. Conant, id. 246; Perkins v. Catlin, 11 Conn. R. 213; Ranson v. Sherwood, 26 Conn. R. 437; Sanford v. Allen, 1 Cush. 473; Gilligham v. Boardman, 29 Maine R., 16 Shep. 79; Thompson v. Armstrong, 1 Breese Ill. R. 23; Wren v. Pierce, 4 Sm. & M. 91; 2 Appl. R. 28.[1] The rule with us seems to be different.

The rule to be deduced from the adjudged cases in this state is that such a guaranty is an undertaking, that the demand is collectible, by due course of law, and that the guarantor only undertakes to pay, when it is ascertained that it can not be collected by suit, prosecuted to judgment and execution against the principal; and

[1] See also Colby v. Farwell, 71 N. H. 83, 51 Atl. 254; Stone v. Rockefeller, 29 Ohio St. 625; Dillman v. Nadelhoffer, 160 Ill. 121, 43 N. E. 378.

that the endeavor to collect of the principal, by due course of law, is a condition precedent to the right of action against the guarantor. (Moakley v. Riggs, 19 J. R. 69; White v. Case, 13 W. R. 543; Eddy v. Stantor, 21 W. R. 255; Taylor v. Bullen, 6 Cow. R. 624; Burt v. Fowler, 5 Barb. R. 501; Loveland v. Shepherd, 2 Hill R. 139; Manning v. Haight, 14 Barb. R. 76; Newell v. Fowler, 23 Barb. R. 628; Van Derveer v. Wright, 6 Barb. R. 547; Gallagher v. White, 31 Barb. R. 92; Cady v. Sheldon, 38 Barb. R. 102.) It must be admitted, also, that the decided weight of authority, in the Supreme Court of this state, is, that a still further condition is implied in such a guaranty, and which is, that due diligence must be used in bringing the suit against the principal, and in prosecuting the same to judgment and execution; and that any laches in this respect will discharge the surety. (See cases above cited.)

I can not find that this question has ever been passed upon in this court, or in the late court of errors. But, as a general rule, its soundness can not be doubted, I think, and it seems unquestioned from the adjudged cases. The rule, which requires the creditor, in such case, to use due diligence to collect the debt of the principal, is just and reasonable, and should be enforced, as well for its reasonableness as for the unbroken current of authority with which it is supported. The rule is not, however, in my judgment, inflexible. It is like most general rules; it has its exceptions. It can not be maintained upon principle, as the unbending rule, under all conceivable circumstances. If the principal debtor is and has been, from the time the right to bring suit against him has accrued, utterly and hopelessly insolvent, with no property, out of which anything could be collected, then the reason of the rule, which requires the principal debtor to be prosecuted to judgment and execution with all diligence ceases, and the familiar maxim of the law, "cessante ratione legis cessat, et ipse lex," steps in and relieves the creditor from the rule of diligence in prosecuting his suit. The reason of the rule ceasing, the rule itself must cease. This must be so, unless we are prepared to hold that the creditor should lose his debt for the want of due diligence in doing a vain, idle and useless thing. The law is said to be the perfection of human reason, and should not be subject to such a reproach. Is it insisted that the judgment and the issuing and return of an execution nulla bona is, under all circumstances, the best evidence of the debtor's inability to pay? If it is it can not be maintained. His recent discharge under the bankrupt act of congress, or under the insolvent laws of the state, on the petition of two-thirds of his creditors is better evidence of his insolvency than the sheriff's certificate upon the execution, that he has no goods or chattels, lands or tenement. The one is preceded by a full and complete judicial investigation into the property and affairs of the bankrupt, and the certificate of discharge is only issued, when the property of the debtor has

been made over to the assignee for the benefit of the creditors. The other is the certificate of a ministerial officer, often made upon the very slightest investigation and never more than prima facie evidence.

What the plaintiff offered to prove, in the case at bar, would have been quite as satisfactory evidence of the inability to collect anything of the principal debtor, as the return of the sheriff, upon an execution; and, it seems to me more so. The plaintiff offered to prove that these principal debtors were, at the time this debt fell due, and that each of them, ever since, had been entirely and hopelessly insolvent, and that nothing could have been collected of them, by proceeding at law, then or since. This evidence was objected to and rejected by the court. Under this ruling, we must hold that the creditor is compelled to proceed to judgment and execution against the principal debtors, where they are concededly, entirely and hopelessly insolvent, and have nothing out of which the execution could be collected, and that he must do this with all diligence or lose his debt. There is no other principle upon which such a proposition can be maintained, than that it is so provided in the bond, and that the party must stand to his contract. The argument must be, that the condition of the guaranty made due diligence, in such a case, a condition precedent to the right of action against this guarantor. The decided weight of authority in the Supreme Court of this state is certainly to this effect. The rule, however, has been seriously questioned by some of the judges in that court, and was distinctly repudiated in the recent case of Cady v. Sheldon (3 Barb. R. 103). All that such a guaranty implies is, that the evidence of debt is good, and collectible by due course of law. The courts have said the law imposes this duty to prosecute the principal debtor with reasonable diligence; and this is for the purpose of insuring the collection of the debt out of the principal, and that no opportunity shall be lost to do so. This is very well, and is all right, as a general rule, as we have already said; but when the principal debtors are utterly and hopelessly insolvent, and have nothing out of which an execution could be collected, then the law excuses the want of diligence, as it would have been idle and useless in accomplishing any purpose whatever. Due diligence in prosecuting the principal debtor, who is proved to be utterly insolvent and without any property, should never be implied in such a guaranty, as a condition precedent to the right of action against the guarantor. There is, certainly, no express undertaking of the kind in the contract of guaranty under consideration; and, as none will be implied, it is not required. The terms, "good and collectible," used in such a guaranty, mean nothing more than "capable of being collected." (Marsh v. Day, 18 Pick. R. 321; Sanford v. Allen, 1 Cush. R. 474, 475.) The rule, which would require the creditor to prosecute with diligence, in such a case, a hopelessly

insolvent debtor, without any property out of which to collect the same, ought not to obtain, for the further reason that it would be at war with the general analogies of the law.

The judgment of the Supreme Court should be reversed and a new trial granted.

Hunt, Ch. J., Grover, Murray and Danield, JJ., concurred with Lott for affirmance. Woodruff and James, JJ., concurred with Mason, J., for reversal.

Judgment affirmed.

If the creditor relies upon the insolvency of the principal as a justification for his failure to bring suit, the burden of proving this is upon him. Allen v. Rundle, 50 Conn. 9, 47 Am. Rep. 599.

In Williams v. Miller, 70 Tenn. 405, it was held that while the holder is bound to sue the maker in the courts of the maker's domicil, he is not required to pursue remedies that he might have against the property of the maker in states other than that of his domicil even though the maker may have property in the state of the holder as well as in his own.

SECTION 8. NOTICE OF DEFAULT

THE PRESIDENT, ETC., OF THE OXFORD BANK *v.* DANIEL P. HAYNES

25 *Mass.* 423, 19 *Am. Dec.* 334 (1829).

Assumpsit upon a promissory note, dated on October 9, 1823, for 1,000 dollars, payable to the Oxford bank in sixty days and grace.

On a case stated it appeared that the note was made by Alpheus Smith and James Anderton as principal and surety, jointly and severally, and was offered at the bank for discount; but the bank refused to discount it, and the cashier wrote on the back of it the words, "I guaranty the payment of the within note," to which Smith procured the signature of the defendant. The note was then discounted at the bank, and the amount thereof was paid to Smith. A payment of 250 dollars was made by Smith at the maturity of the note, about the 1st of December, 1823, and no notice of the non-payment of the residue was given to the defendant. The note so remained until October 7, 1824, when an action was commenced upon it against Smith, and one Southgate was summoned as his trustee. Judgment was rendered in that action, in March, 1825, and Southgate paid on the judgment the amount in his hands, being 535 dollars; and nothing has been paid upon the note or judgment since. Smith and Anderton were reputed to be men of property at the time of making the note and so continued until the time of their failures. Smith failed about the 23d of January, 1824, and Anderton in February following, each being possessed of visible and attachable prop-

erty much exceeding the amount of this note, and which was attached and levied on by their other creditors. Since their failures they have continued insolvent.

Smith lived about ten miles from the Oxford bank and in the same village with Haynes, at the date and maturity of the note. Anderton lived between this village and the bank, and about six miles from the bank.

On the 7th of October, 1824, the directors of the bank chose a committee to go to Leicester to effect an adjustment of the affair, and notice was then given to Haynes that the note had not been paid. Haynes had never given the plaintiffs notice of the failure of Smith and Anderton, nor requested the plaintiffs to collect the note. Both Smith and Anderton, previous to their failures, were in the habit of doing business at the Oxford bank.

The plaintiffs were to become nonsuit or the defendant to be defaulted, according as the court should order.

The declaration contained two counts; one charging the defendant as an original promisor, the other as a guarantee.

Parker, C. J., delivered the opinion of the court. It is very clear from the facts stated that the bank might easily have secured the amount of the note, had they attempted to do it when it became payable, or within a month afterward; and that Haynes, the defendant, had he been seasonably called upon and been notified of the nonpayment of the note, might without difficulty have obtained security from the property of either or both of the promisors. Had he been an indorser of the note, most clearly by the above facts he would have been discharged, not only because the condition of giving notice was not strictly complied with, but because there was gross negligence on the part of the bank, and a new credit given to the promisors without the consent of the indorser.

Haynes therefore can not be liable, unless by the form of his contract he became answerable at all events, and unconditionally, for the payment of the note. And it is contended that this is the legal effect of the contract of guaranty into which he entered.

* * * * * * *

In the case before us the signature of the defendant was not in blank, but under the words written by the cashier, the agent of the plaintiffs, which import a guaranty only. This is the only character in which he can be made liable, and if by law a guarantee is not an original promisor, he can not be sued as such.

We therefore must consider what is the liability of guarantee upon a promissory note; whether he is liable at all events, or only upon condition, and if the latter, whether the condition has been here performed.

This is the point which we think is undecided in this commonwealth, though there have been many allusions to it in cases such

as have been mentioned, in which the question was in relation to the liability of a surety, or of one who put his name on a note not negotiable, or where the party so putting his name had no authority to assign, not being the payee. But no case, in which the contract was in terms a guaranty, and so intended by the parties, has been presented to the court. That a guarantee differs in character from a surety can not be questioned, for he can not be sued as a promisor, as the surety may; his contract must be specially set forth. That he differs from an indorser is equally clear, and for the same reason; and also because he warrants the solvency of the promisor, which the indorser does not, he being answerable on a strict compliance with the law by the holder, whether the promisor is solvent or not. There are cases which adopt a distinction which is reasonable and just, in which the guarantee is discharged only by the joint effect of negligence on the part of the holder, and an actual loss or prejudice to the guarantee in consequence of that negligence. It is certainly conformable to the general principles of right and justice, that the creditor who knows of the delinquency of his debtor, and withholds information of it from the guarantee, by reason of which the debt is actually lost, when it might have been saved by either, should not throw the loss upon the guarantee. It is contrary to the general principles of equity, upon which the law of contracts is considered to rest. Can it be supposed that a creditor holding the note of one thought to be in good credit, and who has ample means of paying, shall have a right, when he finds there is an inability to take up the note on its becoming due, to receive partial payment, give further credit, and thus put the debt in jeopardy, and after he has indulged the debtor ad libitum, shall call upon the guarantee for the deficiency, when absolute insolvency has taken place and all other creditors have saved themselves out of his effects? This would offend all the analogies of the law, which require good faith and diligence, to enable a creditor to call upon parties consequentially liable, and would place a guarantee in a worse condition than a surety; who, being an original promisor, may take up the note when it becomes due and sue the principal immediately. The glaring injustice of such a position has been discountenanced by those courts which have had the question presented distinctly to them.

In 8 East 242, Lord Ellenborough says the same strictness of proof is not necessary to charge the guarantee, as would have been necessary to support an action on the bill itself, that is, against an indorser, where, by the law merchant, a demand upon and refusal by the acceptors must have been proved, in order to charge the other party on the bill, and this, notwithstanding the bankruptcy of the acceptors. Guarantees insure the solvency of the principals, and therefore if the latter become bankrupt and notoriously insolvent, it is the same thing as if they were dead, and it is nugatory to go through the ceremony of making a demand upon them. Lawrence,

J., says, though proof of demand of the acceptors, who had become bankrupt, were not necessary to charge the guarantees, yet the latter are not prevented from showing that they ought not to have been called upon at all, for that the principal debtors could have paid the bill if demanded of them. Le Blanc, J., says it is sufficient as against a guarantee that the holder of the bill could not have obtained the money by making a demand upon the bill.

And in 2 Taunt. 206, it was decided that a guarantee is entitled to notice, if the parties to the bill are not insolvent at the time it is due.

But the principle is more accurately and intelligibly stated by Duncan, J., in the case of Cannon v. Gibbs, 9 Serg. & Rawle 202. "I think", says he, "upon a review of these cases, the line is clearly marked out. It is this: that the guarantor is discharged, if notice is not given of nonpayment to him, that he may avail himself of proper presentment, demand and of due notice of nonpayment where the drawer and indorser, or either of them, are solvent at the time the note became due. But where both are then insolvent, this would be prima facie evidence that a demand on them, and notice to the guarantor, not a party to the bill, would be dispensed with, the presumption being, that the guarantor was not prejudiced by the want of notice."

And this seems to be the true ground; for it leaves the loss upon the party whose gross negligence is the cause of loss to any one, instead of throwing it upon him who would suffer entirely from the carelessness of the party who would recover of him. Upon this principle we decide the present case in favor of the defendant, without trenching at all upon the decisions relating to the liability of sureties, or those who, by signing their names in blank upon notes not negotiable, are regarded as quasi-sureties; this being clearly a contract of guaranty only, in its form, and subject to the rules which govern that species of contract. It is clear that both the promisors in the note were solvent when it became due, and that they had abundant property liable to attachment. But the plaintiffs, with the knowledge of their delinquency, lay by nine months, during which time their property was sacrificed and all hopes of obtaining payment were by that means lost. Some intimations were made in the argument, that it was the usage of the bank, when notes have been discounted, to suffer a renewal from time to time, on the payment of a certain portion of the sum loaned, as the notes should become due. It is not stated in the case agreed, that there was such usage, or any stipulation to that effect, and this was known to the defendant, it may be questionable whether the want of notice would avail him in defense.

Plaintiffs nonsuit.

Accord: Greene v. Thompson, 33 Iowa 293; Cox v. Brown, 51 N. Car. 100; Lemmert v. Guthrie Bros., 69 Nebr. 499, 95 N. W. 1046, 62 L. R. A. 954, 111 Am. St. 561.

Where notice of default is required, failure to give it will be a discharge pro tanto only. Walker v. Forbes, 25 Ala. 139, 60 Am. Dec. 498; Howe v. Nichels, 22 Maine 175; Beebe v. Dudley, 26 N. H. 249, 59 Am. Dec. 341; Davis v. Wells, 104 U. S. 159, 26 L. ed. 686.

Notice from the obligee is unnecessary where the guarantor has notice of the default from an independent source. Mameron v. National Lead Co., 206 Ill. 626, 69 N. E. 504, 99 Am. St. 196.

HELEN M. ROBERTS *v.* LEWIS E. HAWKINS.

70 *Mich.* 566, 38 *N. W.* 575 (1888).

LONG, J.: January 12, 1884, one Lyman D. Follett made his promissory note as follows:

"$1,000. GRAND RAPIDS, MICH., January 12, 1884.

"One year after date, I promise to pay to the order of Helen M. Roberts one thousand dollars, with interest at eight per cent. per annum. Value received.

"LYMAN D. FOLLETT."

And defendant signed an indorsement on the back thereof, as follows:

"For value received, I hereby guarantee the payment of the within note.

"L. E. HAWKINS."

On the delivery of this note to plaintiff, she paid Follett $1,000. January 8, 1885, seven days before this note became due, Follett paid one year's interest; and neither at that time, nor at the maturity of the note, was the same presented to Follett or defendant for payment. No notice of nonpayment was given defendant then or at any time prior to June 8, 1887. January 15, 1886, Follett paid the interest for the next year, and January 17, 1887, for the year following. About June 8, 1887, the note being then two years and five months overdue, it was first presented to defendant, and payment demanded and refused. August 13 this suit was brought.

On the trial, plaintiff, having proved the note and guaranty, and its nonpayment, rested. Defendant then sought to make his defense as pleaded, and offered to show:

1. That he was an accommodation guarantor, without consideration or security.

2. That, at or about the maturity of the note, he inquired of the maker of the note if it was paid, and was told it was.

3. That neither at the maturity of the note, nor at any subsequent time, prior to June 8, 1887, was any notice of the nonpayment of this note given to defendant, nor any demand made on him for the payment thereof.

4. That at the maturity of this note, and for some considerable time thereafter—at least a year—Follett, the maker of the note, was solvent, and had property out of which defendant could have procured him to pay the note or obtained security.

5. That when defendant, on June 8, 1887, learned of the nonpayment of this note, the maker was insolvent, out of the jurisdiction, and that he could then obtain no security or payment.

The court directed a general verdict for plaintiff on all the counts of the declaration. Judgment being entered on the verdict in favor of plaintiff for the amount of the note and interest, defendant brings the case into this court by writ of error.

* * * * * * *

The chief error complained of is the exclusion of the entire defense, and the direction of a verdict for plaintiff. On the trial the plaintiff proved by a witness the application for the loan, the loaning of the money, the giving of the note and guaranty, and, after reading the note and guaranty in evidence, rested. The defendant was then called and sworn as a witness in his own behalf, and was asked by his counsel:

"Q. When that note became due, in January, 1885—January 15—was any notice given you of the fact that it remained unpaid?"

To this question counsel for plaintiff objected, that the same was irrelevant and immaterial; that the defendant was not an indorser nor guarantor of collection, but of payment of the note.

Counsel for the defendant then offered to show by the witness that he had no notice of the nonpayment of the note prior to June 8, 1887; that he was an accommodation guarantor without security; that, at or near the maturity of the note, he inquired of the maker, and was informed that it was paid; that, at the time, the maker of the note was solvent, and for some considerable time thereafter—probably a year—and that the defendant could, if he had any knowledge of its nonpayment, have secured himself, or procured the maker to pay it; that, when the defendant learned of the nonpayment of the note, the maker was insolvent, and out of the state, and no security could have been obtained by the defendant; the counsel then saying:

"That this, of course, is the line of defense marked out by the notice in the pleadings. It is all covered by my brother's argument; and, if we have no right to show that defense, then, of course, there remains nothing but for the court to direct a verdict for the amount of the note, and interest."

The court sustained the objection, and directed a verdict for plaintiff.

In considering the case, the defendant's offer to prove this state of facts must be taken as true. Clay, etc., Ins. Co. v. Manufacturing Co., 31 Mich. 356. Under this offer by the defendant, the issue is

made: Is a person not being a party to a promissory note, who at its date and before delivery, and for the purpose of having a loan made upon the strength of his guaranty, guarantees the payment of such note, liable thereon in case the note is not paid at maturity, without notice of nonpayment having been given to him by the holder at the maturity of the note, or within a reasonable time thereafter; or in case notice is not given, and no proceedings taken to collect the note from the maker, and the maker of the note, at the maturity thereof, was solvent, and subsequently, and before suit is brought on the guaranty, becomes insolvent, can such guarantor, when such action is brought against him, set up such insolvency as a defense? The defense being based on plaintiff's laches in not giving notice to defendant of the nonpayment of this note at maturity, and the consequent damage to defendant thereby, the correctness of the court's ruling depends on whether or not there rested on the plaintiff the duty to give such notice under any circumstances.

The defendant claims that his liability existed only on the happening of a contingency and the performance of a condition; that whether or not that contingency happened, or condition was performed, was matter peculiarly within the knowledge of the plaintiff, and not within his own; and that if plaintiff intended to assert the performance of the condition, or the happening of the contingency, whereby alone defendant was to become liable, it was her duty to do so within a reasonable time, and, in any event, before the maker of the note became insolvent and a fugitive; that her neglect to do so, and the damage to him thereby, has released him from the obligation of his conditional contract.

The position, however, of a guarantor of payment, as between him and the maker of the note, is that of a surety. It is a common-law contract, and not a contract known to the law-merchant. It is an absolute promise to pay if the maker does not pay, and the right of action accrues against the guarantor at the moment the maker fails to pay. The guarantor would not be discharged by any neglect or even refusal on the part of the holder of the note to prosecute the principal, even if the maker was solvent at the maturity of the note, and subsequently became insolvent; and the fact that no notice of nonpayment was given the guarantor at the maturity of the note, or at any time before bringing suit, would not affect the rights of the holder of the note against the guarantor. The guarantor's remedy was to have paid the note, and taken it up, and himself proceeded against the maker.

A guaranty is held to be a contract by which one person is bound to another for the due fulfilment of a promise of engagement of a third party. 2 Pars. Cont. 3.

The contract or undertaking of a surety is a contract by one person to be answerable for the payment of some debt, or the performance of some act or duty, in case of the failure of another person

who is himself primarily responsible for the payment of such debt or the performance of the act or duty. 3 Add. Cont., p. 1111; 3 Kent Comm. 121; Wright v. Simpson, 6 Ves. 734.

In the case of Pain v. Packard, 13 John. 174 (decided in 1816), it was held that if the surety call upon the creditor to collect the debt of the principal, and he disregard that request, and thereby the surety is injured, as by the subsequent insolvency of the principal, the surety was thereby discharged. A directly contrary decision was given by Chancellor Kent, upon argument and full consideration, the following year. Kind v. Baldwin, 2 Johns. Ch. 554. Two years later the last decision was reversed by the court of errors by casting vote of the presiding officer, a layman, and against the opinion of the majority of the judges. King v. Baldwin, 17 Johns. 384.

In the case of Brown v. Curtiss, 2 N. Y. 226 (decided in 1849), the action was brought against the guarantor of a promissory note. On the trial it was admitted that there had been no demand of the maker, nor any notice of nonpayment, and the note was dated April 2, 1838, and payable six months after date. The suit was brought against the guarantor in September, 1845. The defendant offered to prove that, from the time the note fell due until the latter part of 1843, the maker was able to pay the note; that he then failed, and was insolvent at the time of the commencement of the suit, and still remained so. This evidence was objected to, and excluded, and verdict directed for plaintiff. The court (at p. 227) says:

"The undertaking of the defendant was not conditional, like that of an indorser; nor was it upon any condition whatever. It was an absolute agreement that the note should be paid by the maker at maturity. When the maker failed to pay, the defendant's contract was broken, and the plaintiff had a complete right of action against him. * * * Proof that when the note became due, and for several years afterward, the maker was abundantly able to pay, and that he had since become insolvent, would be no answer to this action. The defendant was under an absolute agreement to see that the maker paid the note at maturity. * * *

"If the defendant wished to have him sued, he should have taken up the note, and brought the suit himself. The plaintiff was under no obligation to institute legal proceedings."

The weight of authority, both in this country and in England, sustains this doctrine, and we think with much good reason. Bellows v. Lovell, 5 Pick. 310; Davis v. Huggins, 3 N. H. 231; Page v. Webster, 15 Maine 249; Dennis v. Rider, 2 McLean 451.

In Train v. Jones, 11 Vt. 446, it is said:

"An absolute guaranty that the debt of a third person shall be paid, or that he shall pay it, imposes the same obligation upon the guarantor. In either case, it is an absolute guaranty of the sum stipulated, and the creditor is not bound to use diligence, or to give reasonable notice of nonpayment." Noyes v. Nichols, 28 Vt. 174.

In Bloom v. Warder, 13 Nebr. 478 (14 N. W. Rep. 396), which was an action against the guarantors of payment of a promissory note, the court says:

"This is an absolute contract, for a lawful consideration, that the money expressed in the note shall be paid at maturity thereof at all events, and depends in no degree upon a demand of payment of the maker of the note, or any diligence on the part of the holder."

Mere passiveness on the part of the holder will not release the guarantor, even if the maker of the note was solvent at its maturity, and thereafter became insolvent. Breed v. Hillhouse, 7 Conn. 528; Bank v. Hopson, 53 Conn. 454 (5 Atl. Rep. 601); Foster v. Tolleson, 13 Rich. Law 33; Machine Co. v. Jones, 61 Mo. 409; Barker v. Scudder, 56 id. 276; Norton v. Eastmen, 4 Greenl. 521; Brown v. Curtiss, 2 N. Y. 225; Allen v. Rightmere, 20 Johns. 365; Bank v. Sinclair, 60 N. H. 100; Gage v. Bank, 79 Ill. 62; Hungerford v. O'Brien, 37 Minn. 306 (34 N. W. Rep. 161).

It follows that, this being an absolute undertaking on the part of the defendant as guarantor to pay the amount of this note at maturity in the event of the default of payment by the principal, the guarantor could not demand any diligence on the part of the holder of the note to collect the same from the principal. It was his duty to perform his contract—that is, to pay the note upon default of the principal; and it is no answer for him to say that the principal was solvent at the maturity of the note, and that the same could then have been collected of him by the holder, and that he has since become insolvent. If he wished to protect himself against loss, he should have kept his engagement with the holder of the note, paid it upon default of the principal, taken up the note, and himself prosecuted the party for whose faithful performance of the contract he became liable.

The court properly directed the verdict for the plaintiff; and the judgment of the court below must be affirmed, with costs.

The other justices concurred.

Accord: Pfaelzer v. Kau, 207 Ill. 116, 69 N. E. 914; Pleasantville Mut. Loan &c. Soc. v. Moore, 70 N. J. L. 306, 57 Atl. 1034; Clay v. Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422; First Nat. Bank v. Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. 94; Read v. Cutts, 7 Maine 186, 22 Am. Dec. 184; Booth v. Irving Nat. Exch. Bank, 116 Md. 668, 82 Atl. 652.

CHARLES A. WELCH & ANOTHER, TRUSTEES, *v.* JAMES H. WALSH.

177 *Mass.* 555, 59 *N. E.* 440, 52 *L. R. A.* 782, 83 *Am. St.* 302 (1901).

Contract against the guarantor of a lease dated January 2, 1893, for a term of ten years to one John Judge of a store in Boston at a rental of $750 per annum payable $62.50 monthly. Writ dated February 7, 1898.

At the trial in the superior court, before Mayard, J., it appeared that the guaranty upon the lease, signed under seal by the defendant, was as follows:

"In consideration of the execution of the within written lease, and of one dollar to me paid, the receipt whereof is hereby acknowledged, do hereby guarantee to the said lessors, their heirs and assigns, the true and punctual payment of the rent, taxes and interest reserved at the times and in the manner there mentioned, and, in default thereof, promise to pay the same on demand."

It further appeared, that on November 15, 1897, the defendant received a letter from one of the plaintiffs informing him that Judge had failed to pay his rent for one year and eleven months up to November 1, 1897, and also had failed to pay taxes for the years 1896 and 1897, the whole amounting to $1,705.48. Up to November 15, 1897, the defendant had received no notice that Judge was in arrears and no demand from the plaintiffs for payment of rent or taxes, and had no knowledge of a default in the performance of the terms of the lease. One of the plaintiffs testified that they permitted Judge to remain in possession without taking any steps to enforce payment of the rent or taxes, because Judge was an old and trusted tenant toward whom they wished to be lenient.

The defendant offered to show that from January, 1895, until April, 1897, Judge was actively engaged in business in Boston, and was regularly paying his debts to his creditors other than the plaintiffs; that during the whole of this time he had abundant property, both real and personal, unencumbered, from which the rent could have been collected, and from which the guarantor could have reimbursed himself; that in April, 1897, Judge was petitioned into insolvency, a warrant was issued, and he received his discharge in insolvency; and that ever since that time he had remained altogether insolvent and had no property from which a debt could be collected.

The judge ruled that these facts, if shown, would not be any defense to the action or warrant submitting the case to the jury, and that all evidence of such facts would be inadmissible, and directed a verdict for the plaintiffs for the amount claimed in the declaration. The defendant alleged exception. affirmed

Loring, J.: The evidence, which was excluded, would have warranted a finding that the plaintiffs conducted themselves in the matter of collecting the rent now sued for without that care which a man of ordinary prudence would have devoted to it, and that the defendant has suffered from not knowing that the rent was not paid by the tenant for twenty-three months before the plaintiffs made a demand upon him for it; but it would not have warranted a finding of fraud, or facts tantamount to fraud.

The defendant contends that those facts would have made out a defense to the action, and relies upon a statement in the opinion of Wells, J., in Vinal v. Richardson, 13 Allen 521, 532; he also relies upon Oxford Bank v. Haynes, 8 Pick. 423, and the numerous cases in this commonwealth which have recognized or followed that case; and also upon Douglass v. Reynolds, 7 Pet. 113; Reynolds v. Douglass, 12 Pet. 497; and the opinion of Matthews, J., in Davis v. Wells, 104 U. S. 159, 161.

It is true that there is a statement in the opinion of Mr. Justice Wells in Vinal v. Richardson which supports the defendant's contention; in that case he said: "Formal notice is not necessary in order to charge the guarantor with liability. All the cases agree that in this respect there is a distinction between an indorser and a guarantor. Negligence of the holder of the guaranty, in permitting the claim to slumber, when the guarantor might reasonably suppose it had been paid when due, or in the usual course of business, is the real ground on which the guarantor is exonerated. It is delay without notice, not the bringing of a suit without notice, that is fatal to the holder of the guaranty." But that proposition, which was obiter in Vinal v. Richardson, is not consistent with Watertown Ins. Co. v. Simmons, 131 Mass. 85, not cited at the argument in the case at bar, unless a distinction is to be drawn between a guarantor of rent to be paid each month and sureties on a bond conditioned for the monthly payment of sums to be collected by the principal of the bond. Watertown Ins. Co. v. Simmons was a case where suit was brought against the sureties on a bond, with the condition just stated, and the defense set up was that the plaintiff had failed to notify the sureties that for thirteen months before a demand was made upon them the principal had failed to make payment in full of the sums collected by him; it was held that this was not a defense, and on the ground that "the creditor owes no duty of active diligence to take care of the interest of the surety. It is the business of the surety to see that his principal performs the duty which he has guaranteed, and not that of the creditor."

The defendant's difficulty in this case is to make out that a lessor owes any duty to one who has guaranteed the payment of rent.

It was settled in Vinal v. Richardson, after deliberate consideration that notice to the guarantor that the tenant has not paid the rent is not a condition on which the guarantor's liability depends.

The defendant now contends that, though the guarantor becomes liable upon the default in payment of the rent without notice of it, yet, if the lessor subsequently fails to give notice of that default to the guarantor, and the guarantor suffers damage therefrom, the guarantor is discharged.

Where no duty is owed there can not be negligence, as was lately decided by this court in Shepard & Morse Lumber Co. v. Eldridge, 171 Mass. 516. See also Patent Safety Gun Cotton Co. v. Wilson, 49 L. J. Q. B. (N. S.) 713.

The defendant has undertaken to make out that there is a duty on the creditor to give notice to the guarantor. He has undertaken to establish this, in the first place, on general principles, which are common to all cases where persons are secondarily liable; his proposition is that, in every such case, a creditor is bound so to conduct himself in dealing with one primarily liable as not unnecessarily or unreasonably to injure one secondarily liable. But no such duty is owed to those secondarily liable; the duty owed them is a much narrower one; it is to do no act which affects the rights to which the surety is subrogated on meeting his guaranty, either in property held by the creditor as security for the debt guaranteed, or to bring suit against the principal debtor; if the creditor abstains from doing such an act he has performed his whole duty to the surety. There is no duty upon the creditor to take active measures to collect the debt from the principal debtor or to notify the person secondarily liable that the principal debtor is in default; no authority beyond National Bank of South Reading v. Sawyer, ante, 490, and Watertown Ins. Co. v. Simmons, 131 Mass. 85, need be cited to that point.

There was nothing in the terms of the contract of guaranty in the case at bar which cast upon the lessor the duty of giving to the guarantor notice that the rent had not been paid. The terms of the guaranty in this case were that the defendant does "hereby guarantee to the said lessors, their heirs and assigns, the true and punctual payment of the rent, taxes and interest reserved at the times and in the manner there mentioned, and, in default thereof, promise to pay the same on demand." That is an absolute, unconditional guaranty that the rent shall be paid, coupled with a promise to pay the same on demand being made upon the guarantor, in case there is a default in the payment of rent by the lessee.

If, therefore, there was any duty upon the lessor to give notice to the guarantor that the rent was in default, it must be found in the nature of the contract of a guarantor, and, after the decision in Watertown Ins. Co. v. Simmons, in the nature of the contract of a guarantor, as distinguished from the contract of a surety on a bond, such as was before the court in that case. The difference between the contract of a guarantor and the contract usually entered into by a surety is that in case of a guarantor the promise of the person secondarily liable is a collateral promise to pay, in case default is

made by one who is primarily liable for the thing guaranteed, while a surety contracts directly as a principal to pay the sum of money for which he is secondarily liable. See Bigelow, J., in Allen v. Herrick, 15 Gray 274, 285. So far as this difference is concerned, the contract of the surety upon a bond conditioned for the payment of sums collected by a third person partakes of the nature of the contract of a guarantor and not of the contract of a surety. Moreover, in one of the earliest cases in England in which it was held that notice to a guarantor was not a condition precedent to his liability, the decision was put upon the ground that no such duty was owed by the creditor to the guarantor; it is the case of Brookbank v. Taylor, in the Exchequer Chamber, and reported in Cro. Jac. 685; that was a writ of error brought in an action to collect rent from a guarantor; the error assigned was "because it is not alleged, that notice was given that the other had not paid.—Sed non allocatur; for he at his peril ought to take cognizance of the nonpayment and pay the rent, otherwise the promise is broken." To the same effect, see Baron Parke in Walton v. Mascall, 13 M. & W. 452, 458; and Lord Eldon in Wright v. Simpson, 6 Ves. 714, 734, who says: "But the surety is a guarantee; and it is his business to see, whether the principal pays, and not that of the creditor." No distinction, therefore, can be made between the contract of a guarantor and the contract of a surety on a bond, so far as this question is concerned, and what was said in Watertown Ins. Co. v. Simmons, 131 Mass. 85, 86, is applicable to this case: "The surety is bound to inquire for himself; and can not complain that the creditor does not notify him of the state of the accounts between him and his agent, for whom the surety is liable." See also French v. Bates, 149 Mass. 73, 81.

There are doubtless expressions in the early cases in Massachusetts which countenance the proposition that a guarantor is in all cases entitled to notice of the principal debtor's default. It was decided in this commonwealth in Oxford Bank v. Haynes, that the guarantor of a note, even when the only person liable on it is the principal debtor, is entitled to such a notice and if he is damnified by not receiving it within a reasonable time he is discharged; that case has been followed or recognized in many subsequent cases; Talbot v. Gay, 18 Pick. 534; Sigourney v. Wetherell, 6 Met. 553; Whiton v. Mears, 11 Met. 563, 564; Bickford v. Gibbs, 8 Cush. 154; Parkman v. Brewster, 15 Gray 271; Protection Ins. Co. v. Davis, 5 Allen 54, 58. This rule has been recognized for more than seventy years, and it is now too late to question it. When it was first adopted it was assumed in England as well as in this commonwealth that the guarantor of a note had the same right to notice that an indorser had, the only difference between the two being that in the case of a guarantor, notice could be given at any time before damage was sustained, and that damage from lack of notice had to be proved; see Phillips v. Astling, 2 Taunt. 206; Van Wart v. Woolley,

3 B. & C. 439; and the later case of Hitchcock v. Humfrey, 5 M. & G. 559; the law seems to be otherwise settled in England to-day; see Walton v. Mascall, 13 M. & W. 72; but see Lindley, L. J., in Carter v. White, 25 Ch. D. 666, citing with approval Byles on Bills (12th ed.), 295, who lays down the Massachusetts rule. The weight of authority is against the Massachusetts rule; the cases are collected in Ames Cases on Suretyship, 240, note 1.

It has never been decided that the rule applied in Oxford Bank v. Haynes is one of general application. In Dole v. Young, 24 Pick. 250, Clark v. Remington, 11 Met. 361, and Paige v. Parker, 8 Gray 211, it was assumed that the rule applied in case of a general guaranty for the payment of goods to be subsequently purchased; and in Cabot Bank v. Bodman, 11 Gray 134, it seems to have been assumed to be a rule of general application. But in none of these cases does the opinion rise higher than a mere obiter dictum, except in the case of Clark v. Remington. Clark v. Remington was the case of a guaranty of goods to be subsequently purchased where no notice of any kind was given to the guarantor. The guaranty in question in that case was an offer, and it is settled that in such a case notice of the subsequent purchase must be given. See Bishop v. Eaton, 161 Mass. 496, and cases there cited. Clark v. Remington may well stand on the ground that in that case no notice of the subsequent purchase has been given, so that the guarantor is fully informed of the details of the debt which he has guaranteed, notice of the principal debtor's default must also be given.

It is not necessary to consider now whether notice must be given to the guarantor in cases like Lennox v. Murphy, 171 Mass. 370, in order to throw upon him the duty of seeing that the sums guaranteed by him are paid; it may be that in case of such a contingent guaranty, it is not the duty of the guarantor to see that the sums guaranteed are paid until the contingent guaranty has been made certain by notice stating what sums are due and when they are due, although such notice is not a condition precedent on which his liability depends. See in this connection Hoar, J., in Whiting v. Stacy, 15 Gray 270.

However that may be, there is no case in this commonwealth in which the rule of Oxford Bank v. Haynes has been enforced, in case the thing guaranteed is a debt, definite in amount and in time of payment; but, on the contrary, Chief Justice Shaw said, with reference to that case, in delivering the opinion of the court in Salisbury v. Hale, 12 Pick. 416, 424, which involved the question of a guaranty of rent: "Without deciding whether the doctrines of that case can be extended beyond promissory notes and other mercantile contracts, we are of opinion, upon the principles of that case, notice, in the present, was not necessary," because there had been no change of circumstances.

We are of opinion that when the obligation of the guarantor is to pay a definite sum at a definite time, it is his duty to see that the sum guaranteed is paid, and that there is no duty on the creditor to give notice to the guarantor of a default in payment by the principal debtor; and that if the guarantor, in violation of his duty, has slumbered because he supposed that in the absence of a demand by the creditor the act guaranteed had been performed by the principal debtor and has suffered damage from so doing, he has nothing of which he can complain but his own negligence, and is liable to pay the sum which he guaranteed should be paid.

Exceptions overruled.

WM. TAUSSIG ET AL. *v.* SIMON REID ET AL.

145 *Ill.* 488, 32 *N. E.* 918, 36 *Am. St.* 504 (1893).

MR. JUSTICE CRAIG delivered the opinion of the court.

This is an action brought by Reid, Murdoch & Fischer against E. Kohn and Wm. Taussig, on the following written instrument: "Reid, Murdoch & Fischer, Chicago:

"CHICAGO, January 14, 1887.

"For value received, I hereby guarantee the prompt payment at maturity of any indebtedness owing to Reid, Murdoch & Fischer by Mrs. Mathilda Zuckerman, of 370 State street, and 214 and 216 North Clark street, Chicago, for goods purchased, or which may be purchased hereafter of them, to the amount of fifteen hundred dollars ($1,500.00) with interest on all the above indebtedness, according to the tenor and effect thereof, at the rate of eight per cent. per annum, and I agree to pay all costs or expenses paid or incurred in collecting the same.

"Signed at Chicago, this 14th day of January, 1887.

"Witness: Jos. Zuckerman.

"(Signed) E. KOHN,
"(Signed) WM. TAUSSIG."

In the circuit court the plaintiffs recovered a judgment for $1,680.34, the amount named in the instrument, and interest thereon from the time the action was brought. The judgment, on appeal, was affirmed in the appellate court, and for the purpose of reversing the latter judgment this appeal was taken. It appears from the record that, immediately upon the execution and delivery of the writing, Reid, Murdoch & Fischer commenced selling goods to Mrs. Zuckerman on credit, and continued the sales until November 23, 1887. Her indebtedness to the firm varied in amount from time to time. On the first day of June, 1887, she was indebted in the sum of $1,762.30. On the 1st of July, 1887, $1,958.39. On the 1st of

August, 1887, $1,925.98. On the 1st of September, $2,112.68. On the 1st of October, 1887, $2,342.80. On the 1st of November, 1887, $2,389.51. On November 23, 1887, when the account was closed, $2,714.96.

Mrs. Zuckerman failed on the 24th day of November, 1887, and this action was brought on the guaranty December 9th following. No notice was given the defendants by Reid, Murdoch & Fischer of the failure of Mrs. Zuckerman to pay for the goods which she purchased, and it was insisted on the trial that her insolvency, and the failure of Reid, Murdoch & Fischer to give notice of her default in payment relieved the guarantors from liability on the guaranty. But the court held otherwise, and in the first instruction on behalf of plaintiffs the jury were authorized to find for the plaintiffs, although demand and notice of nonpayment had not been established, and the soundness of this ruling is the principal, and indeed the only, question of any importance presented by the record.

Whether notice of the default of a principal debtor is required in order to fix the liability of a guarantor on a contract like the one involved, is a question upon which the authorities are conflicting. We shall not attempt to review the authorities at length, nor shall we attempt to harmonize the various decisions bearing upon the question, but we shall content ourselves by stating what we understand to be the law on the subject, as established by the weight of authority.

Story on Contracts, vol. 2, p. 1133, in the discussion of the question, says: "Whenever the undertaking by a guarantor is absolute, notice is unnecessary, but where it is collateral merely, notice must be given within a reasonable time, otherwise the guarantor will be discharged, unless he is not prejudiced by the want of notice." In Baylies on Sureties and Guarantors, 202, the author says: "It may be laid down as a general rule, that in case of an absolute guaranty the guarantor is not entitled to demand or notice of nonperformance, but where the undertaking is collateral, and not absolute, notice must be given within a reasonable time, unless circumstances exist which will excuse the want of notice. If the principal is insolvent when the debt becomes due or default is made, so that no benefit could be derived by the guarantor from the receipt of notice, no notice is required."

Where the payee of a promissory note or third parties execute a contract written on the back of an unconditional promissory note for the payment of money at a specified time, in which they guarantee the payment of the promissory note at maturity, the holder of the note is under no obligation to demand payment of the maker, and on default of payment, notify the guarantors. The reason is obvious. The contract of the guarantors is absolute and unconditional, and it requires payment by the guarantors upon maturity of the note. This rule is clearly laid down in Gage v. Mechanics

National Bank of Chicago, 79 Ill. 62, and is well sustained by authority. The principle upon which this doctrine rests is that the contract is absolute, and not conditional or collateral. But does the contract upon which this action is brought rest upon the same principle, or is it to be governed by a different rule? Is the contract in question an absolute contract, or is it collateral or conditional? By the terms of the agreement the appellant guaranteed appellees payment to the amount of $1,500, for goods purchased or for goods which might thereafter be purchased of them by Mathilda Zuckerman.

It is not claimed that any liability exists on account of goods purchased before the execution of the guarantee, so that the words embraced in the guaranty, "for goods purchased," has no special bearing in construing the agreement. It will be observed that the amount of the goods which might be purchased, nor the time during which the deal between Mrs. Zuckerman and appellees should continue, was not mentioned or determined. The contract did not compel Mrs. Zuckerman to purchase or appellees to sell a dollar's worth of goods. They could deal with each other as much or as little as they might desire or as they might see proper. After the guaranty was executed, if appellees chose not to sell Mrs. Zuckerman any goods, it could not be claimed that an absolute guaranty existed, because there was no debt upon which it could operate. How can a guaranty be absolute where it is uncertain whether a debt will ever exist to which it could apply? We think it is manifest that the guaranty was not an absolute undertaking, but, on the other hand, the contract in question was a continuing guaranty of a debt to be created in the future, of an indefinite amount, depending entirely upon the will of appellees and Mrs. Zuckerman.

* * * * * * *

Here the appellants were apprised when they executed the guaranty that it was accepted by appellees; no further notice of acceptance was, therefore, required. But while the testimony disclosed that Mrs. Zuckerman became insolvent on the 24th day of November, 1887, no notice of her default in payment was furnished to appellants before her failure. We think that the decided weight of authority establishes the rule that in case of a collateral continuing guaranty, like the one in question, reasonable notice of the default of payment on the part of the principal debtor should be given to the guarantor. And the guarantor will be discharged from payment so far as he has sustained loss or damage, resulting from a failure of the creditor to give him such notice. Tiedman on Com. Paper 421. Cases may arise where notice would result in no benefit whatever to the guarantor; for example, where the principal debtor was insolvent when the guaranty was executed and remained in that condition. In such cases the failure to give no-

tice could result in no loss to the guarantor, and could not be relied upon as a defense to an action on the guaranty. But where the guarantor may be able to protect himself, notice of default in payment imposes no unreasonable hardship on the creditor, and every principle of commercial usage requires that it should be given.

Judgment reversed.*

LOWE & CO. *v.* BECKWITH

53 *Ky.* 150 (1853).

JUDGE SIMPSON delivered the opinion of the court.

This action is founded upon a guaranty given by Jacob Beckwith in favor of J. B. Maynard, by the following instrument of writing:

"LOUISVILLE, April 26, 1849.

"Mr. J. B. Maynard, being about to commence the retailing of dry goods at Cannelton, Ind., and desiring to open a credit with the firm of James Lowe & Co., of the city of Louisville, I hereby undertake and contract with said Lowe & Co. to become responsible to them for the amount of any bill or bills of merchandise sold by them to said Maynard, agreeably to the terms of sale agreed upon by the parties, without requiring said Lowe & Co. to prosecute suit against said Maynard therefor. JACOB BECKWITH."

The plaintiffs averred in their petition, and proved upon the trial, that they accepted the defendant's guaranty on the day it was given, and notified him that they would sell merchandise to Maynard on credit, looking to the guaranty he had given them for indemnity. They also averred and proved that on the faith of said guaranty they had sold merchandise to Maynard from time to time, between its acceptance and the 19th of May, 1851, inclusive, amounting in the aggregate to several thousand dollars, and that the sum of $443 still remained due to them on account of said sales, which Maynard had failed and refused to pay, although the payment had been demanded of him, of which the defendant had been duly notified.

The defendant admitted the execution of the writing relied on by the plaintiffs, but insisted that according to its terms he was only liable for the first purchases made by Maynard, which had been fully paid for, as appeared by the account of sales and credits which they exhibited. He also denied that he had been duly notified that Maynard was in default in paying for the goods sold to him by the plaintiffs, or that they looked to the defendant, on his guaranty, for the payment of the balance due them.

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*Opinion on rehearing omitted.

Accord: Bashford v. Shaw, 4 Ohio St. 263; Milroy v. Quinn, 69 Ind. 406, 35 Am. Rep. 227; Walker v. Forbes, 25 Ala. 139, 60 Am. Dec. 498; Clark v. Remington, 52 Mass. 361.

It appeared upon the trial that the first bill of merchandise was sold to Maynard by the plaintiffs on the 26th of April, 1849, and amounted to $536. Other sales were made to him in each of the following months during the same year, and at various times during the ensuing year, and were continued to be made from time to time until the month of May, 1851. The sales were on a credit of either four or six months. Partial payments were occasionally made by Maynard, whose purchases amounted in the aggregate during the whole time to $4,470.28, and the payments made by him to $4,027.28. His payments on the 11th of September, 1849, which had been made at different times, amounted to $536, the exact amount of the first bill of merchandise sold to him by the plaintiffs; but the account, although balanced about the end of each year, had never been closed at any time, and the balance, thus ascertained to be due, paid or settled. This action was commenced in October, 1852, and it did not appear that the defendant was notified until within a few days before its commencement, and after Maynard had become insolvent, that he was in default in paying for the merchandise he had purchased of the plaintiffs, or that they considered the defendant liable for the balance due, although the last sales were made in May, 1851; nor did it appear that the guarantor had been informed, at any time during the period within which the sales were made, that the plaintiffs were continuing to make sales of merchandise to Maynard on the faith of his guaranty, although he was notified at the time it was given that it was accepted, and would be acted on by them.

Upon this state of the case the court instructed the jury to find for the defendant as in the case of a nonsuit, which instruction the court gave, and its correctness is the question now presented for our determination.

This instruction is attempted to be sustained on three distinct grounds: First, the writing upon which the action is based is not a continuing guaranty, unlimited in amount and as to time, but a guaranty only of such goods as plaintiffs should sell Maynard, to aid him in commencing business. Second, if the guaranty did not expire with the first sale of $536, still the guarantor is discharged from responsibility, because he was not informed of the subsequent sales, as they were successively made. Third, that no notice of the extent of the sales, or of the amount for which the guarantor was held responsible, was communicated to him within a reasonable time after the expiration of the credit upon which the last sales were made, nor was he informed of the default of Maynard until he had become insolvent, and until a year or more had expired after the debt became due, and by this negligence of the plaintiffs he is discharged from all liability on his guaranty.

Neither the language nor the object of the letter of credit in this case will authorize the conclusion that it was intended and under-

stood by the parties as a limited guaranty. The aid required was not merely to enable Maynard to "commence business," but he being about to commence business, desired to open a credit with the plaintiffs, and the guarantor agreed to become responsible for the amount of any bill or bills of merchandise sold by them to him. The object contemplated was to enable Maynard to open a credit with the plaintiffs, and to purchase from them, from time to time, any bill or bills of merchandise that he thought necessary to the business in which he was about to embark. This object could only be accomplished by giving to the guaranty a continuing operation. It contains no limitation, either as to amount or time. The language used fairly admits of the construction, that it was unlimited in duration, and it was no doubt so understood and acted upon by the plaintiffs. * * *

As this was a continuing guaranty, providing for a series of transactions, and the guarantor was notified of its acceptance, and the intention of the plaintiffs to act under it, he must necessarily have understood that there might be successive sales made, from time to time, according to its terms, and he had no right, therefore, to require that notice should be given him of each sale, as it should be made. In the case of Douglass v. Reynolds, supra, 7 Peters' Rep. 113, it was expressly decided that in the case of a continuing guaranty it was not necessary that every successive transaction under it should be communicated from time to time to the guarantor; see also, on the same point, Wildes v. Savage, 1 Story 22.

But a more important question arises, as to the duty devolving upon the person accepting such a guaranty as this, and giving credit upon it, after the transactions have been completed, and the debt has become due, and default has been made by the person primarily liable. This question, we believe, is now presented for the first time in this court. It was decided, in the case of Kincheloe v. Holmes, etc., 7 B. Mon. 5, that due notice of the acceptance of the guaranty is necessary, and it was said that, as such notice is sufficient to put the guarantor on his guard, the court was not prepared to decide that the creditors, after giving such notice, would be bound to use greater diligence in demanding payment from the principal than a man of ordinary prudence would use in his own case. But, as the question did not directly arise in that case, it was not decided; nor did the court authoritatively determine that the law imposed upon the creditor, in such a case, the exercise of any diligence whatever.

The contract of the guarantor in this case consisted, substantially, either in an undertaking to pay the debt, in case the principal debtor should fail to do so, or in an undertaking that the debt should be paid by him. The extent of the liability that might arise under the guarantee was indefinite, and in some degree optional with the party who was to act under it. As subsequent events,

which were at least partially under the control of the plaintiffs, might determine the amount of this liability, a knowledge of which would be necessary to enable the guarantor to comply with his contract, it might be argued that this information should have been communicated to him before he could be considered in default; but even this can not be conceded, inasmuch as the amount for which he was responsible did not rest exclusively in the knowledge of the plaintiffs, but was also known to the person in whose favor the guaranty was given, from whom he could have obtained the requisite information. If, however, notice of his liability was necessary before a cause of action would accrue against the defendant, such a notice could be given at any time, and it was given in the present case before the action was brought.

It is contended, however, that to make the guarantor responsible for the debt, it is incumbent on the plaintiffs to show that payment of it by the principal was demanded, and notice of his failure to pay given to the defendant within a reasonable time after the debt fell due.

The existence of such an obligation on the part of the person to whom a guaranty is given was recognized in the case of Douglass v. Reynolds, supra, and it was decided that unless such demand was made, and notice thereof given in a reasonable time to the guarantor, he would be wholly discharged from his undertaking. The same case was subsequently brought before the Supreme Court of the United States (12 Peters 497), and, by reference to the opinion then delivered, it will be seen that a modified view of this question was taken, and instead of deciding that a demand and notice of the default constituted an essential ingredient in the case of the plaintiff, in a suit brought on a guaranty it was held that a failure to do so was mere matter of defense, to be set up and relied upon by the defendant, but would be available as such only to the extent of the injury he had sustained by the omission, and be wholly immaterial where no injury had resulted from it. The doctrine upon this point, in this modified form, has been recognized and followed by the Supreme Courts of several of the states. Howe v. Nichols, 22 Maine 175; Smith v. Bainbridge, 6 Blackf. 12; Salisbury v. Hale, 16 Pick. 424.

By other courts this rule has been altogether denied, and it has been held, "that where the undertaking is for the performance of a third party, it is sufficient to establish the existence of a default by the latter, which necessarily involves a breach of the guaranty, and that, as no evidence of demand would be requisite for that purpose were the suit against the principal, the same rule must prevail where it is against the guarantor." Allen v. Rightmere, 20 John. 365; Douglass v. Howland, 24 Wend. 35; Jones v. Train, 11 Verm. 444; Peck v. Barrey, 13 Verm. 93.

Considering the great diversity of opinion that exists, we feel at liberty to adopt such a rule on this subject as will be just in its operation, and of easy practical application, especially in relation to such guaranties as the one sued upon. The rule laid down in the case of Douglass v. Reynolds, and which has been followed in its modified form by the courts of the several states, seems to rest upon a peculiar rule of commercial jurisprudence. Its application is difficult and uncertain in its results, involving as it does not only the question of "reasonable time," in each case, but also the additional question of the extent of injury that has been sustained by the guarantor by the failure to make a demand on the principal debtor, and in case of his default to give notice of it. In what manner is the injury to be ascertained? Must it be determined by the condition of the principal debtor, at the time performance is to be made by him, or within a reasonable time thereafter, and if he were then insolvent does the presumption arise that no injury has been sustained by the guarantor, but that, if he were then solvent, a contrary presumption is to be indulged? Or must an additional inquiry be instituted in order to ascertain whether an indemnity could have been obtained from the principal debtor, had due notice of his default been given? Even if solvent he might have been unwilling to have given an indemnity, and as, in that event, the guarantor could not have been able to secure himself against loss, he would not have sustained any actual damage by the failure to make a demand, and to give notice of the default. This rule, if unexceptionable in every other respect, would certainly be very inconvenient, difficult, and impracticable in its application.

Where the meaning of a guaranty is assumed to be that a third person shall pay a debt, or where it is, that in case of a default on the part of the latter the guarantor will undertake the performance himself, and the guaranty sued upon in this case, imports, undeniably, one or the other of these undertakings, then there does not seem to be, according to the well-established principles of the common law, any obligation upon the creditor to demand payment of the debtor primarily liable, but it is the duty of the guarantor, by inquiring of his principal, to ascertain whether payment has been made, and if not to make it himself, in pursuance of his contract to that effect. Douglass v. Howland, 24 Wend. 35; Oxley v. Young, 2 H. Black. 613.

On the other hand, where the meaning of a guaranty is, that the debt created under it will be a good debt, or that the party in whose favor it is given will be able to comply with his engagements when they fall due, or that the person to whom the guaranty has been addressed will be safe, in the business sense of the term, in giving the credit referred to, there can be no breach of a collateral undertaking of this nature, until it is shown that the debt created under

such a guaranty could not, when it fell due, be collected, the party trusted was insolvent, or the creditor unable, by the use of ordinary diligence, to obtain the payment of the debt.

Upon such a guaranty as the present, notice to the guarantor of its acceptance and an intention to act under it in pursuance of its terms is necessary, because it is in the nature of a proposition, which the party addressed may accept or reject at his option, and until accepted does not constitute a contract between the parties. But no additional obligation devolves upon the creditor. The guarantor, by applying to the party in whose favor the guaranty has been given, can obtain information as to the extent of the liability incurred under it, and also whether such liability has been discharged or still exists; and if he has undertaken that the debt shall be paid by the debtor when it falls due, its nonpayment by him necessarily involves a breach of this undertaking; or if his contract be that he will pay it himself in the event of its nonpayment by the debtor, the default of the latter renders his undertaking absolute, and he becomes immediately liable to an action, inasmuch as it is his duty, according to the very terms of his contract, to pay the debt without demand or notice. This will form a safe and sound rule upon the subject, and by its practical operation render a guarantee of this description, when accepted and acted upon, of some value to the party who has dealt upon the faith of it, and trusted to it to secure the payment of his debt.

The result of these views is, that none of the grounds relied upon are sufficient to sustain the correctness of the instruction given to the jury by the court below. Wherefore, the judgment is reversed, and the cause remanded for a new trial, and further proceedings consistent with the opinion.

SECTION 9. REVOCATION OF GUARANTY

E. D. JORDAN ET AL. *v.* E. DOBBINS, ADMINISTRATRIX

122 *Mass.* 168, 23 *Am. Rep.* 305 (1877).

Contract upon the following guarantee: "For value received, the receipt whereof is hereby acknowledged, the undersigned does hereby guarantee to Jordan, Marsh & Co. the prompt payment by George E. Moore to Jordan, Marsh & Co. at maturity, of all sums of money and debts which he may hereafter owe Jordan, Marsh & Co. for merchandise, which they may from time to time sell to him, whether such debts be on book account, by note, draft, or otherwise, and also any and all renewals of any such debt. The undersigned shall not be compelled to pay on this guarantee a sum exceeding $1,000, but this guarantee shall be a continuing guar-

antee, and apply to and be available to said Jordan, Marsh & Co. for all sales of merchandise they may make to said George E. Moore until written notice shall have been given by the undersigned to said Jordan, Marsh & Co. and received by them, that it shall not apply to future purchases. Notice of the acceptance of this guarantee and of sales under the same, and demand upon said George E. Moore for payment, and notice to me of nonpayment, is hereby waived. In witness whereof I, the undersigned, have hereunto set my hand and seal this twenty-eighth day of February, A. D. 1873. William Dobbins. (Seal.)" Annexed to the declaration was an account of goods sold to Moore.

The case was submitted to the superior court and, after judgment for the plaintiffs, to this court, on appeal, on an agreed statement of facts in substance as follows:

The plaintiffs are partners under the firm name of Jordan, Marsh & Co. and the defendant is the duly appointed administratrix of the estate of William Dobbins.

William Dobbins, on February 28, 1873, executed and delivered to the plaintiffs the above written contract of guarantee. The plaintiffs thereafter relying on this contract sold to said Moore the goods mentioned in the account annexed to the declaration, at the times and for the prices given in said account, all of the goods having been sold and delivered to Moore between January 16 and May 28, 1874. All the amounts claimed were due from Moore, and payment was duly demanded of him and of the defendant before the date of the writ. Other goods had been sold by the plaintiffs to Moore between the date of the guarantee and the first date mentioned in the account, but these had been paid for.

William Dobbins died on August 6, 1873, and the defendant was appointed administratrix of his estate on September 2, 1873. The plaintiffs had no notice of his death until after the last of the goods mentioned in the account had been sold to Moore.

If upon these facts the defendant was liable, judgment was to be entered for the plaintiffs for the amount claimed; otherwise, judgment for the defendant.

MORTON, J.: An agreement to guarantee the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, is a contract of a peculiar character. Until it is acted upon, it imposes no obligation and creates no liability of the guarantor. After it is acted upon, the sale of the goods upon the credit of the guarantee is the only consideration for the conditional promise of the guarantor to pay for them.

The agreement which the guarantor makes with the person receiving the guarantee is not that I now become liable to you for anything, but that if you sell goods to a third person, I will then become liable to pay for them if such a third person does not. It

is of the nature of an authority to sell goods upon the credit of the guarantor, rather than of a contract which can not be rescinded except by mutual consent. Thus such a guarantee is revocable by the guarantor at any time before it is acted upon.

In Offord v. Davies, 12 C. B. (N. S.) 748, the guarantee was of the due payment for the space of twelve months of bills to be discounted, and the court held that the guarantor might revoke it at any time within the twelve months, and that the plaintiff could not recover for bills discounted after such revocation. The ground of the decision was that the defendant's promise by itself created no obligation, but was in the nature of a proposal which might be revoked at any time before it was acted upon.

Such being the nature of a guarantee, we are of opinion that the death of the guarantor operates as a revocation of it, and that the person holding it can not recover against his executor or administrator for goods sold after the death. Death terminates the power of the deceased to act, and revokes any authority or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may depend upon future contingencies. But it is not held for a liability which is created after his death, by the exercise of a power or authority which he might at any time revoke.

Applying these principles to the case at bar, it follows that the defendant is entitled to judgment. The guarantee is carefully drawn, but it is in its nature nothing more than a simple guarantee for a proposed sale of goods. The provision that it shall continue until written notice is given by the guarantor that it shall not apply to future purchases, affects the mode in which the guarantor might exercise his right to revoke it, but it can not prevent its revocation by his death. The fact that the instrument is under seal can not change its nature or construction. No liability existed under it against the guarantor at the time of his death, but the goods for which the plaintiffs seek to recover were all sold afterward.

We are not impressed by the plaintiff's argument that it is inequitable to throw the loss upon them. It is no hardship to require traders, whose business it is to deal in goods, to exercise diligence so far as to ascertain whether a person upon whose credit they are selling is living.

The decision in Bradbury v. Morgan, 1 Hurl. & C. 249, upon which the plaintiffs rely, was rested upon reasoning which appears to us to be unsatisfactory and inconsistent with the opinion of the same court a year before, in Westhead v. Sproson, 6 H. & N. 728, and with the decision in Offord v. Davies, ubi supra, at the argument of which Bradbury v. Morgan was cited; and it has not since been treated as settling the law in England. Harris v. Fawcett, L. R. 15 Eq. 311, 8 Ch. 866. The reasons of the similar decision

in Bank of South Carolina v. Knotts, 10 Rich. 543, are open to the same objections.

Judgment for the defendant.

Accord: Aitken, Son & Co. v. Lang, 106 Ky. 652, 51 S. W. 154, 90 Am. St. 263.

COULTHART *v.* CLEMENTSON AND ANOTHER

5 *Q. B. Div.* 42 (1879).

Bowen, J.: This is an action brought by a bank upon a continuing guarantee against the executor of a deceased guarantor.

Messrs. E. & J. Clementson, cotton brokers and spinners in the county of Chester, had a banking account with the bank of which the plaintiff is the registered public officer. In the year 1867 the bank required security for the advances which were likely to be made to Messrs. E. & J. Clementson, and on the 24th of August, 1867, a written guarantee was executed by Nathaniel Lawton, the deceased, and the defendant Joseph M. Clementson, who is now Nathaniel Lawton's executor (and sued as such).

The material part of the guarantee is as follows:

"We, the undersigned, Joseph Moxom Clementson, of Dukinfield, in the county of Chester, cotton-spinner, and Nathaniel Lawton, of Micklehurst, flannel manufacturer, do hereby jointly and severally undertake and agree to guarantee to the proprietors of or partners in the said banking copartnership for the time being the due and punctual payment when required of all such sums of money as may have been, or may be from time to time, advanced or paid by or from the said banking copartnership, or which the same copartnership may have already paid, or become liable to pay, or may hereafter pay or become liable to pay for or on account of the said Edward and John Clementson, or their order, on any account whatsoever, with interest, commission, and other banking charges upon such sums. * * * And we jointly and severally further agree as follows, namely, that this guarantee or engagement shall be considered a continuing guarantee, and shall not be withdrawn, but shall continue in full force until three months after notice to the manager of the said banking copartnership in Ashton-under-Lyne in writing under our hands of our intention to discontinue or determine the same."

Advances were duly made by the bank under this guarantee down to the death of the testator, Nathaniel Lawton, on the 19th of December, 1875, at which date the firm of Messrs. E. & J. Clementson were considerably indebted to the bank. It was admitted, how-

ever, that sufficient sums of money after notice of the death had been paid into the account, and generally appropriated to the current account, to cover any balance which was in fact owing at the date either of the death or of such notice. Upon the other hand, if the guarantee was not determined in law by death or notice of the death of the testator, it was admitted that the bank, who continued their advances up to May, 1878, to the firm of E. & J. Clementson, were entitled to recover under this guarantee a large sum of £3,000, or thereabouts, which, in case of difference, is to be settled hereafter by a referee.

The cause was tried before myself and a special jury at Liverpool, when it was agreed that the jury should be discharged, and that the court should have power to draw all reasonable inferences of fact.

The evidence as to what had passed between the bank and the defendant as Nathaniel Lawton's executor after Nathaniel Lawton's death is not very clear. From a feeling of mutual courtesy the parties refrained from cross-examination of one another at the trial.

It appeared that the bank knew of the death of Mr. Lawton, but had received no written notice of it addressed specially to themselves. On the 12th of February, 1876, however, the defendant as executor had published in the proper newspapers advertisements under 22 & 23 Vict., c. 35, requiring the creditors of the deceased Nathaniel Lawton to send in particulars of claims to the solicitors of the executors on or before the 14th of May, 1876. The bank and their officers were cognizant of this advertisement, as well as of Nathaniel Lawton's death.

Under the testator's will one-third of his estate was to be in trust for the children of the testator's sister Sarah, who should attain twenty-one years, in equal shares; one-third for the children of his deceased brother, John Lawton, who should attain twenty-one, and the remaining one-third to the brother of the testator, M. H. Lawton. Some of the children were minors. M. H. Lawton, before any claim made by the bank, got his share and spent it.

It was admitted that the bank knew who were the executors, and that, without knowing the terms of the will, the bank knew that the estate was going, one-third of it to the testator's brother, and two-thirds to the children of the testator's brother and sister, some of whom were infants.

The defendant, who was a brother of the partners in the guaranteed firm, Messrs. E. & J. Clementson, had become liable to the bank as a guarantor jointly and severally with Nathaniel Lawton under the guarantee in question. He called at the bank shortly after the appearance of the advertisements, and saw the manager, Mr. Coulthart. The following is the account given by the defendant of the interview: "I went to the bank to see if they could ad-

vance some money on a large public building, the Conservative Hall, and Mr. Coulthart agreed to do so. Then he said, 'I see by the notice in the paper that your brother-in-law is dead. Do you know that you are responsible for £3,000?' And I was not aware of it, but was quite agreeable to be so, knowing my brother to be in good circumstances. He asked me how they were doing. I told him I knew all their affairs, and told him they were doing as well as they could be doing at the time. That is all that passed, to the best of my recollection. We should never have paid the share out if we had thought it was subject to liability."

The defendant was not cross-examined, but it was stated on behalf of the bank that Mr. Coulthart's recollection of the conversation differed from the defendant's, and by consent a written memorandum of the interview made by Mr. Coulthart at the time was put in as containing the substance of the evidence which Mr. Coulthart was prepared to give, and was to be taken as if he had actually deposed to it.

The memorandum was as follows:

"Mr. Clementson called, and said he would sign a new letter of guarantee for £4,000 or allow the existing ones to continue, as might be most agreeable to the directors."

In May, 1878, the guarantee firm, Messrs. E. & J. Clementson, fell, as I have stated, into difficulties. The bank to whom they were indebted heavily for advances, exceeding the amount of the guarantee, claimed under the guarantee to be repaid in the same by the defendant as executor of the testator, and brought this action.

For the defendant it was contended that the testator's estate was not liable for any advances made after the testator's death, or, at all events, after the bank received notice of his death. For the bank it was argued that no notice was given which was equivalent to a notice of the withdrawal of the guarantee, and that the proper inference to be drawn from these facts was that the bank had a right to and did still suppose that the guarantee was to continue.

If it were established that, after the death of the testator the parties had dealt together on the footing that the guarantee was at an end, the case of Harris v. Fawcett, Law Rep. 15 Eq. 311; 8 Ch. 866, would apply, and the bank would not be liable. But I do not decide this case on that ground, though I am not convinced, on the present materials alone, that the bank (defendants?) may not, after the testator's death, have been looking to the defendant's liability as joint and several guarantor on the guarantee, and have considered the guarantee determined as regards the testator and his estate.

It is possible, on the other hand, that the executor himself supposed the guarantee to be at an end, while the bank entertained no definite opinion on the subject. It would be difficult for me to ex-

press any clear view about the matter, as the evidence leaves me still in some doubt about it. It is not necessary, if my judgment be well founded, to decide the point.

I am of opinion that the notice with which the bank in the present case was affected amounted to a discontinuance, so far as future advances were concerned, of the guarantee. A guarantee like the present is not a mere mandate or authority revoked ipso facto by the death of the guarantor. It is a contract, and the question from what time and on what notice it ceases to cover advances is a question of construction of the contract itself. In the case of such continuing guarantees as the present, it has long been understood that they are liable, in the absence of anything in the guarantee to the contrary, to be withdrawn on notice. Various explanations have been offered of this reasonable, though implied, limitation. The guarantee, it has been said, is divisible as to each advance, and ripens as to each advance into an irrevocable promise or guarantee only when the advance is made. This explanation has received the sanction of the Court of Common Pleas in the case of Offord v. Davies, 12 C. B. (N. S.) 748; 31 L. J. (N. S.) (C. P.) 319. Whether the explanation be the true one or not, it is now established by authority that such continuing guarantees can be withdrawn on notice during the lifetime of the guarantor, and a limitation to that effect must be read, so to speak, into the contract. But what is to happen on his death? Is the guarantee irrevocable and to go on forever? It would be absurd to refuse to read into the lines of the contract in order to protect the dead man's estate a limitation which is read into it to protect him while he is alive. On the argument of the present case it was virtually conceded that the provision as to three months' notice relating only to the guarantor's life, and there being no corresponding provision as to the notice to be given on his death, the guarantee could be legally determined at any time after the guarantor's death by a proper notice to that effect. But there remains the question what is the proper notice to be given. To answer this question we must consider the change which the guarantor's death has effected in the situation. The notice can not any longer be given by the guarantor. He is dead. The executor of his will is guardian of his estate, and if notice is to be given by any one, the executor would seem the person to give it. But must the executor give special notice that the guarantee is withdrawn; or is it not enough that the bank should be warned of the death of the testator and the devolution of his estate to others? In many cases the executor has no option to elect to continue the guarantee. Surely it would in such cases be idle to insist on special forms of withdrawal of a guarantee which nobody has a right to continue. Notice of the death and of the existence of a will is notice of the existence of trusts which may be incompatible with the continuance of the guarantee. If, in-

deed, under the testator's will, the executor has the option of continuing the guarantee, then from the absence of any specific notice of withdrawal, the bank may, perhaps, in spite of notice of the death, properly assume, as against the estate, that the guarantee is not to be determined. But if the executor has no option of the sort, then, in my opinion, the notice of the death of the testator and of the existence of a will is constructive notice of the determination as to future advances of the guarantee. The bank from that moment is aware that the person who could during his lifetime have discontinued the guarantee by notice can not any longer be a giver of notices; that his estate has passed to others who have trusts to fulfil, and it is easy for them to ascertain what those trusts are. If these trusts do not enable the executor to continue the guarantee, then the bank has constructive notice that the guarantee is withdrawn. If, indeed, the contracting parties desire that on the death of the guarantor a special notice shall be necessary to determine the guarantee, they can so provide in the guarantee itself; and such a provision will, of course, bind the estate. In re Silvester, '95, 1 Ch. 573, the parties did so provide, and it was accordingly adjudged that the estate of the deceased surety continues liable on a bond to secure the repayment of successive advances, although the advances were made after knowledge of the surety's death. Romer, J., said, p. 576: "I think that on such a contract as this the plaintiffs were entitled to rely on the express provisions of the contract with them, and were not bound to take the notice of the obligor's death as a notice from his executors to determine the liability. The proviso freed the plaintiffs from being bound by any implied notice of or being bound to make inquiry as to whether there would be any breach of trust on the part of the executors in not giving notice to determine the liability." See also Hecht v. Weaver, 34 Red. R. 111. Ed. Here there is no such provision.

Judgment will, therefore, be entered for the defendants, with costs.

Judgment for the defendants.

ESTATE OF MICHAEL RAPP *v.* THE PHŒNIX INSURANCE COMPANY

113 *Ill.* 390, 55 *Am. Rep.* 427 (1885).

This is an appeal from the appellate court for the Third district, affirming an order of the circuit court of Morgan county, allowing a claim of $188.90 against the estate of M. Rapp, deceased, in favor of the Phœnix Insurance Company. The executors of Rapp bring the case here, on a certificate of the judges of the appellate

court that it involves important questions of law which should be passed upon by this court.

The foundation of the claim thus allowed is the following bond:

"Know all men by these presents, that I, Joseph B. Booker and Albert H. Brace, of the town of Jacksonville, county of Morgan, and state of Illinois, as principals, and M. Rapp, of the town of Jacksonville, county of Morgan, and state of Illinois, as surety, are firmly held and bound to the Phœnix Insurance Company, a corporation incorporated by the legislature of Connecticut, and located at Hartford, and state of Connecticut, in the sum of $1,000, to be paid unto their certain attorneys or assigns, to which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors and administrators, firmly to these presents.

"Sealed with our seals, and subscribed at Jacksonville, this 28th day of December, 1880.

"The condition of this obligation is such that, whereas, the above-named J. B. Booker & Co. has been duly appointed by the directors of the aforesaid company their agents for the city of Jacksonville and its vicinity, state of Illinois, during their pleasure, and by reason whereof, and as such agent, he will receive into his hands and possession divers sums of money, policies, chattels and other effects, the property of said company, and is bound to keep true and accurate accounts of said property, and of his receipts and disbursements, and to account for and pay over the same to the said company when demanded, and comply with all instructions furnished him from the office of said company, or from H. M. Magill, general agent, at Cincinnati, Ohio,

"Now, therefore, if the said J. B. Booker & Co. shall promptly pay to said company the amounts received from time to time, and shall well and truly perform all and singular the duties aforesaid, for and during the time he officiates as said agent, and shall deliver all the property which he may receive and hold as such agent, to his successor in office, or to such other person as the company or its authorized officers may direct, then this obligation shall be null and void, otherwise to remain in full force and virtue.

"JOSEPH B. BOOKER, (Seal.)
"ALBERT H. BRACE, (Seal.)
"M. RAPP." (Seal.)

The remaining facts are embodied in a stipulation between the parties, which is as follows: That appellee appointed J. B. Booker & Co. its agents, and by the contract of appointment said agents were to make with appellee a full settlement of each month's business at the end of each and every month while they should remain the appellee's agents; that said agents were not appointed for any specified time; that M. Rapp signed the bond in evidence; that M.

Rapp died about the 10th of March, 1882; that notice of the death of M. Rapp was published in the newspapers in Jacksonville in the month of March, 1882, that the agents of appellee had actual notice of the death of M. Rapp at the time of his death; that said agents faithfully made their monthly settlements with appellee for ten months after the death of M. Rapp, and paid appellee all that was due it up to January 1, 1883; that said agents failed to make settlement with appellee for the month of January, 1883, and also failed to make a settlement for the month of February, 1883; that appellee did not notify the executors of M. Rapp of the failure of said agents to make the January, 1883, settlement, until after the failure to make the February settlement; that the claim filed shows correctly the sums received by said agents in the months of January and February, 1883, which they failed to pay over. The entire deficit of the agents was $260. The court charged the estate of Rapp with the default for January, which, as already appears, amounted to $188.90, but refused to allow the one for February, and appellee has assigned as a cross-error the ruling of the court in rejecting the latter claim.

Mr. Justice Mulkey delivered the opinion of the court.

It is contended by appellant that the bond in question is, in legal effect, the same as a guaranty of future advances to the extent of $1,000; that it did not become binding or operative upon the makers until money or other property belonging to the company came into the hands of J. B. Booker & Co. as its agents; that money or property thus coming into their hands is to be regarded in the nature of future advances, and to be governed by the same rules of law that are applicable to such advances; that the contract being indefinite as to its duration, either party had the right to terminate it on notice; that it existed, so to speak, by the continued desire or joint will of the parties, and as this, in the nature of things, could not extend beyond their joint lives, and as Rapp could not, after his decease, terminate the contract by notice, the law itself terminated it, and hence Rapp's estate is not bound for anything that occurred after his death. Such is the position of appellant, as we understand it.

The bond in question is something more than an ordinary contract of guaranty. It is a joint and several contract between Joseph H. Booker, Albert H. Brace and M. Rapp, on the one side, and appellee on the other. The contract discloses upon its face that Booker and Brace, under the style of J. B. Booker & Co., had been appointed agents of appellee in conducting the insurance business, and that by virtue of their appointment, and the service upon which they had or were then about to enter, certain moneys, chattels and effect would come into their hands, which of itself disclosed a sufficient consideration to support the undertaking of the obligors so long as the agency continued. The contract therefore became binding immediately upon the execution of the instrument, and had a default on the part of the agents occurred in the lifetime of Rapp,

there is no question but that a joint action might have been maintained on the bond against all three of the obligors. The instrument, then, was a written contract, whereby the obligors, jointly and severally, bound themselves, their executors and administrators, to the extent of $1,000, for the faithful discharge of the duties of two of them in a certain specified business of a confidential character. Two of the obligors stipulate for their own honesty and business fidelity; the other joins in the stipulation, and also individually guarantees the same thing. It is to be observed, that, unlike an ordinary continuing guaranty, as it is claimed this is, nothing is to be done by any of the parties to the instrument to give it effect or make it binding upon them, as is always the case where the payment of future advances, merely, is guaranteed. The difference between the two cases is well illustrated by the language of the court in Jordan et al. v. Dobbins, 122 Mass. 168, cited and relied on in appellant's brief. In that case the goods sued for were sold after the guarantor's death, and the court, in holding there could be no recovery, among other things said: "An agreement to guarantee the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, is a contract of a peculiar character. Until acted upon it imposes no obligation, and creates no liability of the guarantor. After it is acted upon, the sale of the goods upon the credit of the guaranty is the only consideration for the conditional promise of the guarantor to pay for them. It is in the nature of an authority to sell goods upon the credit of the guarantor, rather than a contract which can not be rescinded except by mutual consent. Thus, such a guaranty is revocable by the guarantor at any time before it is acted upon. Such being the nature of the guaranty, we are of opinion that the death of the guarantor operates as a revocation of it, and that the person holding it can not recover against his executor for goods sold after the death."

Without expressing any opinion for the present in respect to the conclusion reached in that case, we fully concur in the general expressions of the court with regard to the peculiar character of a continuing guaranty where it is supported by no consideration other than advances to be made at a future day, and where the party to whom the guaranty is given assumes no obligation to make such advances, as is generally the case with such guarantees. But the transaction now under consideration can hardly be said to be a guaranty of this character. Taking a common-sense business view of the matter, the giving of the bond, and its acceptance by the company, were the final acts by which Booker and Brace were clothed with authority to open an insurance office at Jacksonville in the name and on behalf of the company. And there can be no doubt but that the intrusting them with its business, and permitting them to conduct it with the public in the company's name, was

a sufficient consideration, independent of the fact the instrument was under seal, to support the agreement in question. In these respects the Dobbins case is wholly unlike the one in hand. In this case no additional act was to be done by appellee, or any one else, to give the bond effect. Business was commenced, and continued under it for a long time, satisfactorily to all parties. Even according to the rule applicable to continuing guarantees, strictly so-called, the bond under consideration was in full force and effect long before Rapp's death. We have looked with considerable care to see if the general principles applicable to a continuing guaranty of the kind mentioned have ever been extended to an ordinary agent's bond, as is sought to be done here, and we have wholly failed to find any authority for it, and certainly none has been cited.

Considerable space in appellant's brief is occupied in an effort to show that Rapp's liability upon the bond could have been terminated at any time before his death by his giving the company notice to that effect. Whether his liability could have been thus terminated in his lifetime, or whether his executors might in this manner have terminated it after his decease, are questions which do not directly arise on this record, as it is not pretended any such notice was given, either before or after his death. But as these questions probably have more or less bearing upon the main question in the case, presently to be stated, they may be incidentally noticed further on.

The controlling question in the case is, whether upon Rapp's death the bond in question, by mere operation of law, ceased to have any legal effect as to subsequent transactions between the company and its agents, J. B. Booker & Co. It is a familiar rule of law that requires no citation of authority for its support, that the death of the principal is per se a revocation of the agent's authority, and hence all contracts or other engagements subsequently entered into by the latter, on behalf of the principal, are absolutely void as to his legal representatives, and this notwithstanding the death of the principal was unknown at the time such contracts or other engagements were entered into. On the other hand, the general rule unquestionably is, that all contracts entered into by one, not of a personal character, are equally binding upon himself, and his legal representatives after his decease. This general rule is well stated in Chitty on Contracts (10th Am. ed.), p. 101. The author says: "It is a presumption that the parties to a contract bind not only themselves, but their personal representatives. Executors, therefore, are held to be liable on all contracts of the testator which are broken in his lifetime, and, with the exception of contracts in which personal skill or taste is required, on all such contracts broken after his death; and such parties may likewise sue on a contract, although they be not named therein." In the present case, however, Rapp,

as we have already seen, expressly binds his executors and administrators, and hence no question of presumption of liability can arise, so far as Rapp's legal representatives are concerned, for if it be possible to bind them by any terms, they are certainly bound.

Appellant contends, however, as the bond is nothing more than an ordinary continuing guaranty, without limitation as to time, and could not for that reason have extended, in any event, beyond the guarantor's life, the provision expressly binding his personal representatives must have been intended to apply only to such defaults as might occur during his lifetime. For reasons already appearing and others hereafter to be stated, we do not think this view is sound. In support of the proposition that the bond in question ceased to have any legal effect or binding force upon the death of Rapp, as to all subsequent transactions, four cases are cited and relied on, namely, Pratt v. Trustees, etc., 93 Ill. 475; Jendevine et al. v. Rose et al., 36 Mich. 54; Harris v. Fawcett, 15 Law Rep. Eq. C. 311, and Jordan et al. v. Dobbins, already referred to.

The principle applied to the Pratt case, and upon which it was decided, is the well-recognized doctrine that a mere voluntary proposition may be withdrawn at any time before such action is taken under it as will, in law, show not only its acceptance, but also a sufficient consideration to sustain it as a contract. In every case of a mere voluntary proposition, if the party making it die before any action has been taken under it, his death will, in law, operate as a withdrawal of the proposition—consequently it can not be accepted or acted upon afterward so as to bind his estate. The principle here stated, and which was applied to the Pratt case, we do not think has any application to this one.

Jendevine et al. v. Rose et al., supra, in some of its features is much like the case before us. In that, as in this, the action was upon a bond which, like the present case, was founded upon a sufficient present consideration, and related to a contemporaneous contract of indefinite duration, which was subject to be abrogated by either of the parties to it, and, of course, upon such abrogation the bond itself would have become functus officio. Here the resemblance between the two cases ceases. The bond in that case was a guaranty of future sales; in this it is a guaranty of the honesty and fidelity of particular persons in a specified business. In that the money sought to be recovered was the price of goods sold after the obligee in the bond had been expressly notified not to make any further sales on the faith of the defendant's guaranty. In this case, neither Rapp, in his lifetime, nor his executors, after his decease, gave any such notice. It will be thus seen the two cases differ materially in a number of important particulars, so that there is no ground for the claim that that case controls this. The actual point decided in the Michigan case is, that the surety (the obligor in the bond) had the right to terminate his liability upon it by giving no-

tice, as he did. This certainly falls far short of sustaining the position that a liability of that character is determined by death, without such notice.

Harris v. Fawcett, supra, was a chancery proceeding. The guaranty in that case was one of future advances, wherein it was expressly provided the guaranty should continue for six months, notice in writing, under the hand of the guarantor, "to discontinue the same." The guarantor died, leaving as his executor on whose account the guaranty had been given. It was known to the creditors having the guaranty, there was no personal estate to discharge the liability of the deceased upon the guaranty, nevertheless they continued to make advances to the executor, on the faith of it, after the guarantor's death. This was such a transaction between the creditors and the executor, who was acting in manifest disregard of his duty to the estate, with their knowledge, that no court of equity ought to have sustained it, and so it was held. In that case, as we have just seen, the right to terminate the contract by six months' notice was expressly reserved in the contract itself. But as the death of the guarantor rendered it impossible to give the kind of a notice provided for, namely, a notice under the guarantor's own hand—a fact to which the court seems to have attached considerable importance—it was held, as the contract was clearly not intended to continue forever, the estate of the guarantor, under the circumstances, was not bound for advances made after his death. The case, however, is not an authority for the proposition that the death of a guarantor in a case like the present is per se an abrogation of the contract. On the contrary, the logic of the entire reasoning of the court leads irresistibly to the opposite result. In the present case there is no provision in the contract of the obligors by which they are authorized to terminate their liability on the bond, and the duration of their liability is therein expressly declared to be during the time J. B. Booker & Co. officiate as agents of the insurance company—so it is clear the contract in this case is essentially different from the one in that, but the reasoning in that case as just observed, is clearly against the appellant in this.

In the case of Jordan et al. v. Dobbins, supra, the action was brought on a continuing guaranty to recover the price of goods sold after the guarantor's death, and it was held there could be no recovery, on the ground the guarantor's death terminated the guaranty, notwithstanding it was unknown at the time the goods were sold. In thus holding, the case is clearly unsupported by the decided weight of authority. Chitty on Contracts, supra; Brandt on Suretyship, § 113; Green v. Young, 8 Greenlf, 14; Moore v. Wallis et al., 18 Ala. 458; Royal Ins. Co. v. Davies, 40 Iowa 469; Menard v. Scudder, 7 La. Ann. 385. If, as contended by appellant, there is no difference in principle between that and the present case, it must be admitted the former is an authority directly in point sus-

taining his position; but, as already indicated, we think there is an essential difference between a guaranty of future advances, whether in the form of a bond, or, as is usually the case, of a mere stipulation, and a bond executed by an agent and his sureties for the faithful discharge of the former's duties in some business or employment, as was the case here. Such a bond is, in all its essential features, like the bond of an executor, guardian, trustee, and the like. The only difference between the two cases is, that most of these bonds are required to be taken by express statutory provision. But this only relates to the duty of giving such a bond. It does not change its scope, character or legal effect when given. All voluntary bonds executed for a lawful purpose, like statutory bonds, derive whatever efficacy or binding force they have, from the positive law of the state, and in this respect there is no difference in the two classes of bonds. To hold that the estate of a surety on an ordinary trustee's bond is absolutely discharged from all future liability upon the death of the surety, on the ground that his death is per se an extinguishment of the bond, would certainly be a startling proposition to come from this or any other court of final resort; and yet to decide this case in conformity with appellant's theory would be, in legal effect, to assert, as we understand it, that very proposition. We unhesitatingly decline, both upon reason and authority, to give our adhesion to any such a doctrine. We have no doubt of the correctness of the ruling of the trial court in allowing appellee's claim to the extent it did. * * *

Holding, as we do, the ruling of the trial court was correct in allowing the claim for the amount it did, it follows the appellate court properly affirmed the order.

Judgment affirmed.

Dickey and Craig, JJ.: We can not concur in this decision. We think this bond, on the part of the surety, is simply a continuing guaranty by him of the good conduct of the agents of the insurance company—that the relations of the parties were in their nature capable of determination at the will of either the insurance company or of the agents in question, or at the will of the surety. This surety certainly could not be held indefinitely, but by notice of his unwillingness to be bound further, could relieve himself from liability accruing thereafter. In this his case differs from that of surety for an officer, executor or guardian. We think the death of the surety operated to terminate his obligation as to moneys coming to the hands of the agents thereafter. On this latter question the authorities are not in harmony. We, however, think the reason of the matter is decidedly in favor of the proposition that in this regard death was equivalent to notice. See Jendevine v. Rose, 36 Mich. 54; Jordan v. Dobbins, 122 Mass. 168; Harris v. Fawcett, 15 Law Rep. Eq. C. 311.

*Part of opinion omitted.

BALFOUR *v.* CRACE

L. R. 1 *Ch. Div.* 773 (1902).

In 1882 the plaintiff, Blayney Reynell Balfour, who was the owner of certain estates in Ireland, appointed one Dolling to act as agent of his estates and receive the rents thereof, and, in consideration of this appointment, Dolling and his father-in-law John Gregory Crace as his surety, executed a joint and several bond dated June 25, 1883, for the sum of £3,000 in favor of the plaintiff. This bond was given at the plaintiff's request by way of security for the due performance by Dolling of his duties and obligations as the plaintiff's agent and receiver.

The bond was in the following form:

"Know all men by these presents that we, Caledon Josias Radcliffe Dolling, of 34 Mountjoy Square, in the city of Dublin, Esquire, and John Gregory Crace, of No. 38 Wigmore Street, London, in the county of Middlesex, and of Springfield, Dulwich, Esquire, are jointly and severally held and firmly bound to Blayney Reynell Balfour, of Townley Hall, Drogheda, in the city of Louth, Esquire, in the sum of £3,000, to be paid to the said Blayney Reynell Balfour, or his attorney, his executors, administrators or assigns, for which payment to be well and truly made we bind ourselves and each of us, one and each and every of our heirs, executors, and administrators, jointly and severally, firmly by these presents."

The bond then recited that Dolling had previously been employed by the plaintiff's predecessor in title, B. R. Balfour, as agent of the estates, and proceeded as follows:

"And whereas the said Blayney Reynell Balfour has appointed the said C. J. R. Dolling his agent or receiver of the rent, issues, and profits of all his estates in Ireland. And whereas upon such appointment of the said C. J. R. Dolling as aforesaid the said B. R. Balfour required the said C. J. R. Dolling to enter into security for the sum of £3,000. And whereas the said J. G. Crace has consented to become surety for the said C. J. R. Dolling. Now the condition of the above obligation is such that if the above bounden C. J. R. Dolling shall pay or cause to be paid to the said B. R. Balfour all sums of money which shall represent the rents, issues, and profits, of said estates payable to the said B. R. Balfour as executor of the said B. R. Balfour, and shall and will from time to time and at all times hereafter as often as requested by the said B. R. Balfour, his executors, administrators, or assigns, well and truly pay or cause to be paid unto the said B. R. Balfour, his executors, administrators, or assigns, all such sum or sums of money as he the said C. J. R. Dolling shall have had or received of the said rents and profits of the said estates, and shall and will render to the said B. R. Balfour

and his heirs, executors, administrators, and assigns true, just, full, and perfect accounts of all and every such sum and sums of money as shall be by him had or collected from the tenants and occupiers of said estates, or from or on account of the rents and profits of the said estates or any part thereof, or for or on account of the said B. R. Balfour, his heirs, executors, administrators, or assigns, and shall and will while he shall continue to act as such agent or receiver, well, justly, truly, and honestly in every respect conduct himself in the said office of agent or receiver of the said rents, then this obligation and every matter and thing therein contained shall be void and of no effect; otherwise the same shall remain in full force and virtue in law."

Dolling continued to act as the plaintiff's agent and receiver until about February, 1900; but in April, 1900, he executed an assignment to a trustee for the benefit of his creditors, and left the country, having failed to account to the plaintiff for large sums received on his behalf.

J. G. Crace died on August 13, 1889, having by his will appointed the defendants to be his executor. This was an action by the plaintiff seeking to make the defendants liable upon the bond.

The defendants pleaded that the liability of their testator under the bond ceased upon his death.

By an order dated October 28, 1901, upon the application of the plaintiff, and upon an admission by him that the said J. G. Crace died on August 13, 1889, and that he, the plaintiff, had notice of the death shortly after that date, the following point of law was directed to be tried before any evidence was given or issue of fact tried, namely: "Whether the liability (if any) of the said J. G. Crace under the bond dated the 25th June, 1883, was determined on the death of the said J. G. Crace, or when such death first became known to the plaintiff." During the course of the argument the form of the question was slightly amended, and as amended read as follows: "Whether the liability (if any) of the said J. G. Crace under the bond was determined immediately or otherwise by the mere fact of his death coming to the knowledge of the plaintiff." * * *

Joyce, J.: I think it is undoubtedly law that a continuing guarantee not under seal for future advances, if not so framed as to become operative before it is acted on, may be revoked or withdrawn altogether before being acted on, and as to further or future transactions may be terminated at any time unless the contrary be expressly stipulated. Now, the reasons for this in the case of such a guarantee are, I think, pretty obvious on a moment's consideration, and they are put very lucidly in the judgment of Erie, C. J., in Offord v. Davies, 12 C. B. (N. S.) 748.

When such a guarantee is under seal, I think it has been held at law that the guarantor is not entitled by notice to determine its op-

eration. But in equity, I think, even in the case of a continuing guarantee under seal, such a guarantee as that I have mentioned, where, as Lush, L. J., puts it in the case of Lloyd's v. Harper, 16 Ch. D. 319, "the consideration is fragmentary, supplied from time to time, and therefore divisible," the operation of the guarantee as to future transactions may be determined by notice. Now, the right to determine or withdraw a guarantee by notice forthwith can not possibly exist, in my opinion, when the consideration for it is indivisible, so to speak, and moves from the person to whom the guarantee is given or conferring an office or employment upon any person whose integrity is guaranteed. It is impossible that the guarantor should be entitled by notice, unless he has expressly so stipulated, to determine that guarantee instanter. Time must be allowed —at all events, it is admitted that some time must be allowed—for a lawful determination of the employment by the person to whom the guarantee is given, and I think, with reference to a guarantee of the nature which we have to consider in the present case, many other considerations are applicable besides merely a lawful determination of the employment by giving six months' notice, or something of that kind. As I said in the course of the argument, six months' notice might determine the employment just in the midst of the audit or receipt of the rents; or the employer might be placed in such a position with reference to the person employed that it might be most inadvisable and injurious to put an immediate end to the employment.

If, however, such a guarantee can be determined by notice at all, the question what length of notice the employer must necessarily be entitled to, I think, has not been determined, and must depend upon the circumstances of the particular case. Now, that being so, there is no difficulty whatever to my mind in answering the question which was argued before me as it originally stood. It would have been impossible to hold that with respect to this guarantee, where there is no stipulation to the contrary, the liability of the guarantor under the bond was determined immediately, either on the death of the guarantor or on the fact of his death coming to the knowledge of the person to whom the guarantee was given. But I am told that that is not the real question, and it was proposed to alter the question in a form which was party suggested by myself, and the question I have to decide is whether the liability, if any, of Mr. Crace under the bond was determined, immediately or otherwise, by the mere fact of his death coming to the knowledge of the plaintiff. Now, whatever the true answer to that question may be, and whether such a guarantee as this can be determined by notice or not, I certainly agree with what Romer, J., says in In re Silvester (1895), 1 Ch. 573, 577, where he observed on Lord Bowen's decision in Coulthart v. Clementson, 5 Q. B. D. 42: "I desire to add that I do not assent to the general proposition that where a person who is himself

entitled to the benefits of a contract of guaranty has notice of the death of the guarantor and that he left a will, he is, without more, affected with notice of the contents of the will, or is bound to assume that prima facie it would be a breach of trust on the part of the executor not to give notice to determine that liability." I desire to express my entire agreement with that, whatever the proper answer be to the question whether such guarantee as that which we have to consider in this case can be determined by notice or not. Really what we have to decide is this—whether, when the guarantee is of this kind, given as part of the consideration for the appointment to an office or employment of a person by another to whom the guarantee is given, the law requires the guarantor, in case he desires the guarantee to be determinable by notice or by his death, to have it expressly so stipulated, or does the law require the person to whom the guarantee is given to have it expressly so stipulated if the guarantee is not to be determined by notice or by death of the guarantor? Well, after listening to the argument and giving some consideration to the case, I have come to the conclusion that upon the whole where an office or employment is conferred in consideration of such a guarantee as that in this case, it is safer to hold that the guarantor must expressly so stipulate or provide if he desires the guarantee to be determinable by notice, or to be determined by his own death. And in coming to that conclusion I rely on Gordon v. Calvert, 2 Sim. 253; 4 Russ. 581; 29 R. R. 94, and also upon what I understand to be the reasoning of the Lords Justices in Lloyd's v. Harper, 16 Ch. D. 290, although I have not forgotten that there was a special fact in that case, namely, that the person whose integrity was there guaranteed was in what was analogous to employment which could not be determined by Lloyd's.

Therefore I can answer this question, as altered, by saying that the liability, if any, of the said John Gregory Crace under the bond dated June 25, 1883, was not determined, immediately or otherwise, by the mere fact of his death coming to the knowledge of the plaintiff.

CHAPTER 4

SURETYSHIP DEFENSES

SECTION 1. MATERIAL ALTERATION OF THE CONTRACT

(a) Simple Contracts

WHITCHER *v.* JAMES HALL

5 Barn. & Cress. 269 (1826).

BAYLEY, J.: I think that the rule for entering a nonsuit ought to be made absolute. By the agreement which is set out in the declaration, the plaintiff agreed to let, and Joseph Hall agreed to take, the milking of thirty cows (not more nor less) for the sum of £7 10s. per cow per annum, to commence on the 14th of February, 1824, and on the conditions therein mentioned. The agreement was, that Joseph Hall was to have the milking of thirty cows, and the benefit was to inure to Joseph, not to James, but the latter stipulated that he would pay the whole rent. One question is, whether that is an entire contract as to the number of cows. If it be, Joseph was entitled to have the milking of thirty cows during the continuance of the term. If it was not an entire contract, but a contract to pay for so many cows as the plaintiff should supply, and the plaintiff supplied twenty-nine or any other number, he would be entitled to payment for so many. I am of opinion that this was an entire contract for the purchase of thirty cows; and if at commencement of the term the plaintiff could not insist that this was a divisible contract, it must follow that it continued an entire contract during the term. I do not enter into the question whether there was a performance of the contract at the commencement of the term. It is sufficient to say that there was a new agreement, without the knowledge of James; that Joseph was to have the milking of twenty-eight cows during one part of the year, and thirty-two during the other part. That, as it seems to me, was not a continuance of the original bargain, which was for the milking of thirty cows, but a new agreement. The new agreement was binding only on those persons who were parties to it. If it had been intended to bind James by it, he should have been consulted; he had a right to insist upon a literal performance of

the original bargain. If a new bargain was made, he had a right to exercise his judgment whether he would become a party to it. There may, perhaps, be very little difference between the two contracts, but the question does not turn on the amount of the difference; but the question is, whether the contract performed by the plaintiff is the original contract to which the defendant was a party. If it is, then James is bound by it; otherwise he is not. There is no hardship upon the plaintiff, for he knew that James stipulated to pay the rent upon his, the plaintiff's fulfilling the terms of the original bargain, and that he, James, was not bound to consent to the substitution of a new contract. In Heard v. Wadham, 1 East 619, and Campbell v. French, 2 H. Black. 163; 6 T. R. 200, it was held that the performance of a contract, substantially the same as that originally made, did not give a right of action against a surety who had not consented to the alteration. Here the plaintiff attempts to maintain his action by proving the performance not of the contract declared on, but of a subsequent agreement. But he has averred, and was bound to prove performance of the original agreement. That he has not proved; and, upon that ground, I am of opinion that he was not entitled to recover, and that the rule for entering a nonsuit ought to be made absolute.*

HOLME v. BRUNSKILL.

L. R. 3 Q. B. Div. 495 (1877).

Cotton, L. J.:* This is an appeal of the plaintiff against a judgment of Denman, J., in favor of the defendant, Robert Brunskill. The action was on a bond for £1,111, dated the 18th of March, 1873, executed by George Brunskill, Robert Brunskill, and others in favor of the plaintiff. The plaintiff was at the date of the bond, and still is, the owner of a farm called Riggindale, and before the execution of the bond he had agreed with George Brunskill to let to him as yearly tenant Riggindale Farm, including certain hill pasture held therewith, and also a flock of 700 sheep; and the bond, in which Robert Brunskill joined as surety for George Brunskill, was given to the plaintiff to secure the delivery to him at the end of the tenancy of the flock of sheep in good order and condition. The material part of the condition of the bond is as follows: "If the above bounden G. Brunskill should, at the determination of the tenancy, deliver up to H. P. Holme, along with the said farm and premises, the like number, species, and quality of good and sound sheep as

*Holroyd, J., concurred. Littledale, J., dissented.

*Statement of facts omitted.

were delivered to the said G. Brunskill as aforesaid;" and "in case the said stock of sheep should, at the determination of the said tenancy, be reduced or deteriorated in number, quality, or value, should pay to H. P. Holme compensation for such reduction or deterioration, to be ascertained by certain arbitrators" in manner therein provided; and "should yearly and every year during the tenancy pay, or cause to be paid, to H. P. Holme, by way of rent or interest for the sheep, the sum of £35 by two equal half-yearly payments," then the bond should be void.

On the 9th of November, 1875, the plaintiff gave to George Brunskill a notice to quit the farm, which was in terms a notice to quit "on the 10th of April, 1876, or at the expiration of the year of your tenancy, which shall expire next after the expiration of one-half year from the service of the notice." The notice being served less than six months before the 10th of April, 1876, was ineffectual to determine the tenancy on that day, but was effectual to determine it on the 10th of April, 1877. Before the 10th of April, 1876, George Brunskill and the plaintiff met, and George Brunskill objected to the insufficiency of the notice to quit. Whereupon the plaintiff stated that he did not wish to take the farm from him, but that he wanted part of the farm called the Bog Field, and it was thereupon agreed that George Brunskill should surrender this on the 10th of April then next, and that his rent should from that time be reduced by £10 a year, and that the notice to quit should be considered as withdrawn. This agreement was carried into effect, and George Brunskill continued to hold the remainder of the farm, but early in October following, the plaintiff gave him due notice to quit on the 10th of April, 1877. Before this time arrived George Brunskill got into difficulties and had become insolvent. His trustee sometime in March, 1877, gave up the farm, and it was then ascertained that the flock referred to in the bond was reduced in number and deteriorated in quality and value; and the action has been brought to recover from the defendant, under his bond, compensation for the diminished value of the flock.

Mr. Justice Denman, before whom the action was tried, gave judgment for the defendant, and against this judgment the plaintiff has appealed.

One ground on which the defendant relied in supporting the judgment was, that his obligation under the suretyship bond had expired before the deficiency arose, that is to say, that by the notice to quit and agreement made as to the surrender of the Bog Field, and the withdrawal of the notice, a new tenancy was created, to which the bond did not apply; and for this he relied on the case of Tayleur v. Wildin, Law Rep. 3 Ex. 303, as an authority, that under the circumstances a new tenancy was created; and it was on the authority of Tayleur v. Wildin, Law Rep. 3 Ex. 303, that Mr. Justice Denman, as we understand, principally relied, but we are unable to agree with

this view. In Tayleur v. Wildin, Law Rep. 3 Ex. 303, the tenant continued in the occupation of the farm after the day for which the notice to quit, which was withdrawn, had been effectually given, and the rent for which the surety was sued accrued in respect of the occupation after that day, and the court considered the continuance of the tenant's possession after that time as a new tenancy, and that the guaranty, which applied only to the old tenancy, was therefore gone. But in the present case the tenancy of George Brunskill was, in fact, determined on or before the day when, if the notice to quit had not been withdrawn, it would have ended. The deficiency and deterioration of the flock therefore occurred at the determination of the very tenancy to which the bond referred. It was, however, argued that the effect of giving up the Bog Field must be a surrender of the old tenancy. But we are of opinion that this can not be maintained, and that notwithstanding the surrender to a landlord of part of the land demised, the former tenancy of the remainder of the farm still continues.

It was contended by the defendant, that even if there was a continuance of the old tenancy the effect of the surrender of the Bog Field was to discharge him as surety from all liability. The Bog Field contained about seven acres, and the jury, in answer to a question left to them, at the trial, found that the new agreement with the tenant had not made any substantial or material difference in the relation between the parties, as regards the tenant's capacity to do the things mentioned in the condition of the bond, and for the breaches of which the action was brought. The plaintiff's contention was that this must be treated as a finding that the alteration was immaterial, and that, except in the case of an agreement to give time to the principal debtor, a surety was not discharged by an agreement between the principals made without his assent, unless it materially varied his liability or altered what was in express terms a condition of the contract.

In my opinion this contention on behalf of the plaintiff can not be sustained. No doubt there is a distinction between the cases which have turned on the creditor agreeing to give time to the principal debtor, and the other cases. Where a creditor does bind himself to give time to the principal debtor, he, with an exception hereafter referred to, does deprive the surety of a right which he has, that is to say, of the right at once to pay off the debt which he has guaranteed, and to sue the principal debtor; and without inquiry whether the surety has, by being deprived of this right, in fact suffered any loss, the courts have held that he is discharged. The exception to which I have referred is, where the creditor, on making the agreement with the principal debtor, expressly reserves his right against the surety; but this reservation is held to preserve to the surety the right above referred to, of which he would be otherwise deprived. The cases as to discharge of a surety by an agreement

made by the creditor, to give time to the principal debtor, are only an exemplification of the rule stated by Lord Loughborough in the case of Rees v. Berrington, 2 Ves. Jr. 540: "It is the clearest and most evident equity not to carry on any transaction without the knowledge of him (the surety), who must necessarily have a concern in every transaction with the principal debtor. You can not keep him bound and transact his affairs (for they are as much his as your own) without consulting him."

The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it can not be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which can not be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged. This is in accordance with what is stated to be the law by Amphlett, L. J., in the Croydon Gas Company v. Dickenson, 2 C. P. D., at p. 51.

The plaintiff, in support of his contention, that having regard to the finding of the jury, the surety was not discharged, relied on various dicta to the effect that any material change in the contract between the principals will discharge the surety. Even if by these expressions the judges intended to state that to have the effect of releasing the surety the alteration must be material, does not follow that they intended to lay down that no alteration would discharge the surety unless the jury, in an action to enforce his liability, held it to be material, or to express any opinion at variance with the rule laid down by me. The case of Sanderson v. Aston was specially relied on by the plaintiff. But Martin, B., though he did not formally dissent from the decision of the majority of the court, was not satisfied with the judgment; and if the decision is to be considered as based on the reason given by Pollock, B., that the court was entitled to consider whether the alteration was material, it can not, in our opinion, be sustained.

In the present case, although the Bog Field contained seven acres only, yet, it can not be said to be evident that the surrender of it could not prejudicially affect the surety. Some of the witnesses for the plaintiff admitted that it was occasionally used for pasturing, that its loss would be appreciable in the spring, and that it might

make a difference of fifteen in the number of the sheep which the farm would carry.

The case may also be considered in another point of view. The bond given by the defendant, the surety, was to guarantee the delivery up of the flock of sheep therein referred to at the determination of the tenancy of the Riggindale Farm, which, in our opinion, must mean Riggindale Farm as then demised to George Brunskill, and the bond certainly implied that he should continue to hold the farm as then demised till the flock was given up. The contention of the plaintiff, if it could be supported, would make a variation in this contract, as to the materiality of which there is at least a doubt, and would make the defendant liable for a deterioration of the flock during the time when the tenant held a smaller farm than that contemplated by the contract of the surety.

The plaintiff's counsel relied on some observations made by Lord Cottenham in the case of Hollier v. Eyre, 9 H. L. C. 57. But, in fact, those observations are in favor of the defendant and not of the plaintiff. What Lord Cottenham says is, "The surety will be left to judge for himself between his original undertaking and another substituted for it, but that is not the case where the contract remains the same, though part of the subject-matter is withdrawn from its operation." In this case, as already pointed out, the original contract of the surety was that the flock should be delivered up in good condition, together with the farm, as then demised to the tenant. No part of that which was guaranteed was ever withdrawn from the operation of the bond. But the plaintiff attempts to substitute for the contract that the flock should be given up in good condition, with the farm, as then demised, a contract that it should be delivered up in like condition with a farm of different extent. In my opinion the surety ought to have been asked to decide whether he would assent to the variation. He never did so assent, and in my opinion was discharged from liability, notwithstanding the finding of the jury, inasmuch as in my opinion the question was not one which ought to have been submitted to them.

Lord Justice Thesiger concurs in this judgment.

Brett, L. J.: I speak with great deference when I say I can not bring my mind altogether to agree with this judgment, and I feel bound to observe that I arrive at another view than that which has been expressed. As to the first part of the judgment I entirely agree. I do not think there was any new tenancy, and I ground that view on the fact of the finding of the jury, amongst other things, that the alteration was immaterial. It is the latter part of this view with which I can not agree. In the first place, this case comes before us fettered by certain rules. We are bound to observe that it is a direct appeal from the decision of my Brother Denman, after a trial by jury; we are, therefore, not at liberty to ask whether the question he left was left in proper form. There can not be a motion here for

misdirection, and we are not at liberty to say that the finding of the jury was contrary to the evidence. It is a general rule that we have no right to look at the verdict, but accept it according to its ordinary construction. I find the question left to the jury was, whether the new agreement with the tenant, which we are told did not alter the tenancy, made a substantial or material difference in the relation between the parties as to the tenant's capacity to do the things mentioned in the bond, and for breach of which the action was brought. They not only found that, but my brother Denman says that the matter is far more fit for the consideration of a jury of the county of Cumberland than for a lawyer, and he can not say that he is dissatisfied with their view. Therefore there is the finding of the jury with the assent of the judge. If it were necessary to give an opinion, considering I have not an intimate knowledge of these things, but from what I know of Cumberland farmers, so far from dissenting from the opinion of the jury, I think it is a substantial finding. When one remembers how many views are taken as to farms in Cumberland, I should be inclined to agree with the jury and to say it did not make any material difference. We are bound by that finding, and can act in conformity with it. Where there is a suretyship bond, and there are some alterations in the contract or relation of the parties under the bond as to guaranteeing its performance, the question is whether the surety is released. I can not bring my mind to think he is, for the law takes no notice of alterations that are neither material nor specific. The proposition of law as to suretyship to which I assent is this, if there is a material alteration of the relation in a contract, the observance of which is necessary, and if a man makes himself surety by an instrument reciting the principal relation or contract, in such specific terms as to make the observance of specific terms the condition of his liability, then any alteration which happens is material; but where the surety makes himself responsible in general terms for the observance of certain relations between parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract. My opinion is in accordance with the finding of the jury, and it will be most dangerous in this particular case to put ourselves in the place of a jury, and because we think seven acres may make a difference, or £10 a year, may make a difference, to set aside the finding of the jury, which is that neither one is material or substantial. I think the surety is not released. The doctrine of the release of suretyship is carried far enough, and to the verge of sense, and I shall not be one to carry it any further.

Judgment affirmed.

CHANDLER LUMBER COMPANY, APPELLANT, *v.* RADKE, RESPONDENT

136 *Wis.* 495, 118 *N. W.* 185, 22 *L. R. A. (N. S.)* 713n (1908).

Plaintiff, lumber dealer in Chicago, on July 17, 1906, had agreed upon a sale of two bills of lumber, specified in detail for two houses, for which one H. Schutte, a builder, had taken contract, amounting to $2,160, and before shipment thereof the defendant executed a guaranty in part as follows:

"I guarantee the payment of the above amount to you for lumber and building material purchased of you by Mr. H. Schutte to be delivered free on board cars, Madison, Wis., as per your estimates number 2113 and 2134 dated July 8th and 17th, 1906; payment to be made within sixty days after date of invoice, provided same is found as specified in your estimates above referred to."

Schutte was without capital, but had worked for defendant, who had confidence in him. Plaintiff promptly commenced shipping such lumber in carload lots; said cars being shipped so that it was to be delivered to Schutte only upon his payment of the freight, for which he was allowed credit by the plaintiff. Afterward Schutte, having obtained other contracts, commenced ordering the lumber therefor also from the plaintiff, and thereafter carload shipments were made containing both the lumber on the first two estimates guaranteed by defendant and on other orders. The latter part of October, Schutte absconded. The plaintiff's representative, who had made the sales and had full charge of the dealings and collections from Schutte, came to Madison, found a quantity of lumber stored by Schutte in a vacant building, and seized and returned the same to Chicago. This action was brought to recover from the defendant the entire sum of the first two estimates, $2,160.

The defenses were, first, that by shipping to Schutte subject to the freight bills, whereby he had been compelled to pay sums amounting to over $150 before he could obtain the lumber, the plaintiff had materially departed from and modified the contract and discharged the guarantor; second, that by the seizure and recaption of a part of the lumber which had been delivered under this guaranty plaintiff had deprived Schutte and the defendant of the benefit which would have resulted from completed performance of the contract, and therefore discharged the defendant as guarantor. Also that plaintiff had received as payment upon said guaranteed debt the $1,500, the freight advances of $153, and the value of the lumber so reclaimed after Schutte's disappearance

This action was tried to a jury and a special verdict rendered to the following effect: (1) That plaintiff did not inform the defendant of any custom that the purchaser should pay and have credit

for freight on lumber shipped f. o. b. Madison; (2) that plaintiff did apply $1,500 payment upon the two estimates guaranteed by the defendant; (3) that the value of the lumber from the guaranteed shipments which plaintiff took back was $150; (4) that defendant did not consent that such lumber be taken. This verdict was assailed by all necessary motions to raise the questions discussed on this appeal, but the court held thereon that, by imposition of the conceded burden of freight before the lumber could be received by Schutte from the railroad company, the contract had been materially modified and defendant discharged from his guaranty; also that by the recaption of lumber which had been delivered and was needed to build the buildings specified in the estimates, the contract had been modified to the hurt of the defendant and he discharged. Accordingly judgment was rendered for the defendant, from which the plaintiff appeals.

Dodge, J.: Error is assigned upon the holding of the trial court that the shipping of the lumber so that the purchaser, Schutte, could not obtain it at Madison except by paying the freight charges thereon was a departure from the terms of the contract, and evidence was offered to prove a custom to so ship lumber even under a contract for its delivery free on board at its place of destination. The court's ruling in this respect must be approved. The expression "free on board" in a contract like this is not ambiguous and therefore not open to construction either by proof of custom or otherwise. Vogt v. Schienebeck, 122 Wis. 491, 100 N. W. 820; Fromme v. O'Donnell, 124 Wis. 529, 532, 103 N. W. 3. "Free on board cars, Madison," means that the plaintiff, in order to perform its contract must deliver the lumber on board cars at Madison, Wis., free to be taken by the purchaser without any obstruction, burden or impediment. It is not so delivered when, in order to take it into his possession, he must discharge a lien thereon for freight.

But appellant further contends that, even though this were a departure from the terms of the contract, the surety is not thereby discharged, for that the variation was not prejudicial to him, since Schutte received credit for the amount of freight which he paid and thereby reduced the indebtedness for which the defendant as surety was liable. It is elementary that a surety is favored in the law. As he ordinarily does not receive the benefit of the contract, but is a mere volunteer, he has a right to define exactly the conditions upon which he shall be responsible for the debt of another, and only upon compliance with those conditions can he be held to such liability. 1 Brandt Suretyship (3d ed.), 427; W. W. Kimball Co. v. Baker, 62 Wis. 526, 22 N. W. 730; Stephens v. Elver, 101 Wis. 392, 77 N. W. 737; Cowdery v. Hahn, 105 Wis. 455, 81 N. W. 882; Electric A. Co. v. U. S. F. & G. Co., 110 Wis. 434, 85 N. W. 648; Omaha Nat. Bank v. Johnson, 111 Wis. 372, 87 N. W. 237; Charley

v. Potthoff, 118 Wis. 258, 265, 95 N. W. 124. While this rule was originally enforced with entire strictness, it is now subject to certain exceptions, among which the only one claimed to be relevant to the present situation is set forth in Stephens v. Elver, supra, namely, if the variation appear to be wholly immaterial and without prejudice to the surety's rights it will be ignored. Of course the principle remains that the surety may determine and specify the exact terms upon which he will be liable and has a right to stand upon those terms, and it is only when a court is able to say with certainty that an expression in the contract apparently declaring a condition of such liability is so immaterial to him and departure therefrom so necessarily without prejudice that it can not believe in an intention of the parties to express it as a condition of liability does the above noted exceptions apply. In the instant case, while the reduction of Schutte's indebtedness by the amount of the freight probably would be beneficial rather than injurious to the defendant under most circumstances, yet, when we remember that it was made to appear that Schutte was engaging in the business of a building contractor almost wholly without means of his own, and his ability to pay for the materials and labor in any given piece of work depended upon his completion thereof and consequent receipt of the contract price, which, as we know, is usually in large part withheld pending such completion, it becomes apparent that any obstacle placed in the way of speedy completion enhanced the danger of his becoming involved by pressing indebtedness and the interruption of his work by creditors. It can not be doubted, therefore, that the provision for sixty days' credit upon the lumber which entered into these two building contracts, amounting to about $2,000, was of the greatest importance in promoting the probability of his success and consequent ability to meet debts. To that end, even a small amount of cash might be very important, and the deprivation thereof seriously prejudicial. The $150 which he was obliged to pay in cash in order to obtain these materials might well have enabled the hiring of labor or the purchase of such materials as he could not obtain upon credit and which were necessary to the completion of the work. We are, therefore, brought to substantial agreement with the trial court on the proposition that the requirement that Schutte pay about seven per cent. of the price of this lumber in cash instead of upon a credit of sixty days was a departure from the terms of the contract which we can not say with any degree of certainty was immaterial or without prejudice to the surety. If Schutte, as appears to have been the case, assented to this modification, the contract was changed without the consent or approval of the surety. If he did not consent, the plaintiff has failed in the performance of its contract in a respect material to the surety's promise, which in either case is not enforcible. W. W.

Kimball Co. v. Baker, 62 Wis. 526, 531, 22 N. W. 730; Charley v. Potthoff, supra; Walrath v. Thompson, 6 Hill 540.

As this conclusion must result in affirmance of the judgment, no discussion of the sufficiency of the other grounds upon which it rests need be indulged.

By the court—judgment affirmed.

Kerwin, J. (dissenting): I can not agree with the majority opinion that the payment of freight changed the contract in any material particular. The amount of freight paid was simply an advancement of a portion of the purchase-price before the same became due, and was credited upon the contract. While Schutte was not required to pay any portion of the purchase-price before due, still the payment of the freight, which was credited upon the purchase-price and decreased to that extent the obligation of the surety, can not, in my opinion, be held a material alteration of the contract, unless it can be said to have prejudiced the surety. There is nothing in the record tending in the least to show that it did, and therefore I can not see that such payment discharged the surety. Stephens v. Elver, 101 Wis. 392, 77 N. W. 737; Madison v. Am. S. E. Co., 118 Wis. 480, 95 N. W. 1097; Grafton v. Hinkley, 111 Wis. 46, 86 N. W. 859, and cases there cited; Rice v. Filene, 6 Allen 230; Groendyke v. Musgrave, 123 Iowa 535, 99 N. W. 144; Feustmann v. Estate of Gott, 65 Mich. 592, 32 N. W. 869; Stearns Suretyship, 72; 1 Brandt Suretyship (3d ed.), 428, 445. The sixty days' credit upon the whole amount of the purchase was in this case for the benefit of Schutte, and the waiver of it to the extent of the amount of freight advanced did not prejudice the surety, as appears from the record; and, this being so, there was no material alteration of the contract. I do not think the case before us is one where the principals to the contract, without the consent of the surety, changed the terms of the credit to the prejudice of the surety in the sense of the cases laying down that rule. Nor do I think there was any breach of the contract, but, even if there was a technical breach, it was without prejudice to the surety, and therefore wholly immaterial.

I think the judgment below should be reversed.

Timlin and Marshall, JJ.: We concur in the foregoing dissenting opinion of Mr. Justice Kerwin.

See also Koppitz-Melchers Brewing Co. v. Schultz, 68 Ohio St. 407, 67 N. E. 719; Prior v. Kiso, 81 Mo. 241; Evans v. Lawton, 34 Fed. 233.

(b) Negotiable Instruments

HIRAM G. WATERMAN *v.* WALTER S. VOSE ET AL.

43 *Maine* 504 (1857).

Tenney, C. J.: The note in suit for the accommodation of Amaziah Nash, the maker, was written by Vose, one of the firm of "Vose & Joyce," and signed by him with the name of the firm, without the words "with interest." In pursuance of the previous arrangement between Nash and the plaintiff, it was offered by Nash in payment of a yoke of oxen which he had agreed to purchase of the plaintiff; the latter insisting that the note should be on interest, these words were added by Nash in the presence of the plaintiff without the knowledge or consent of the defendants. Whether Nash signed the note at the time of its indorsement by the defendants, or afterward, was a question on which Nash and Vose did not agree; and under the instructions it was not a material question.

It was contended that the description of the note in the written notice of its dishonor, was so defective, the words "with interest" being omitted, that the liability of the indorsers never become fixed. The jury were instructed that if they should find that the defendants, by said notice, might be presumed to know it referred to the note in suit, they might find it to be sufficient. This instruction was correct, on the authority of the case of Smith v. Whitney, 12 Mass. 6, in which a question similar in principle was submitted to the jury.

If this question was for the court instead of the jury, we are satisfied it was correctly settled, and the defendants were not prejudiced.

The jury were instructed, that the addition of the words "with interest" to the note, after it was indorsed by the defendants, was a material alteration. But they were also instructed, substantially, that if the words were added without fraud, and without the knowledge of the defendants, before the note was delivered to the plaintiff, whether the maker signed his name at the time it was indorsed, or at the time the note was delivered, the alteration did not discharge the defendant's liability.

These instructions when applied to an alteration in an accommodation note or bill, made by the consent of the parties to be affected by it, are correct; but not so, when the alteration is not made with the knowledge and consent of such parties. In the case of Master v. Miller, 4 D. and E. 320, it was decided that the alteration of the date of the note avoids it, or a bill of exchange, by which the payment was accelerated, and after acceptance, and so effectually that even an innocent holder for a valuable consideration, can not support an action upon it.

In 1 Greenl. Ev., § 565, it is said, "the grounds of this doctrine is two-fold. The first is, that of public policy to prevent fraud, by not permitting a man to take the chance of committing a fraud without running the risk of losing by the event, when it is detected. The other is to insure the identity of the instrument, and prevent the substitution of another, without the privity of the party concerned. The instrument derives its legal virtue from its being the sole repository of the agreement of the parties, solemnly adopted as such, and attested by the signature of the party engaged to perform it."

The law carefully guards the rights of sureties upon an instrument, whether the relation to the principal is shown by his being surety in the technical sense of the term, indorser or otherwise. A promissory note, signed by principal and surety, or a note or bill indorsed for the accommodation of another party thereto, defines the liability intended to be assumed, and any alteration changing this liability without his consent will discharge him; such as the change of the date, the amount, the time or place of payment.

It was held in Miller v. Stewart, 9 Wheat. 680, that the contract of surety is to be construed strictly, and is not to be extended beyond the fair scope of its terms. Judge Story, in delivering the opinion of the court in this case, says: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of the surety is not to be extended beyond the terms of his contract. To the extent and in the manner, and under the circumstances pointed out in the obligation, he is bound, and no farther. It is not sufficient that he sustain no injury by a change in the contract, or that it may be even for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal. This doctrine certainly does not fail to apply to a contract which has been altered materially, after it has passed from the hands of the surety or indorser, though it has not been delivered to the party authorized to treat it as available. After a material alteration, it is not the contract the party signed, and a negotiation first made after the alteration can not make it his contract. The distinction in the instructions has no foundation in reason or in law.

When a person puts his name to paper, which is full in form, for a certain sum payable at a certain time and place, for the accommodation of another, who is to become a party to the same, when it shall be negotiated, his liability is limited by the precise terms of that paper. An alteration afterward, which is material, without his consent, will make it a contract which he never executed, and which it is manifest he never intended to execute, and it is a new contract, to which he can in no sense be treated as a party, and he can not be bound by it. It bears no analogy to the case where one signs or indorses blank notes or bills, to be filled by the party to be

accommodated, according to his discretion and supposed necessities.

In England, under the stamp acts, a note or bill materially altered, even by consent of parties, without a new stamp, is void. And it has been said in English elementary treatises, that "an accommodation bill is not issued so as to be incapable of alteration, until it comes into the hands of one entitled to treat it as an available security." 2 Stark. Ev., 295, note (g). This note, in the abstract, would seem to support the instructions which we are now considering. But the authority cited by Mr. Starkie will show that the alteration was by consent of the party attempted to be charged and the defense, that the contract was void, was upon the ground that every bill shall have a stamp, which was not upon the one in question after the alteration. But the court held that the bill not having become effectual before the alteration, it was not thereby a new contract.

In this case the defendants assumed a liability for the sum of two hundred and sixty dollars, at the end of seven months, and no other. The alteration made the note for a larger sum at the same time. The instructions were not based upon the hypothesis that the alteration was with the consent of the defendants, and were unauthorized in law.

If the courts should be of the opinion that the alteration in the note in suit renders it void, it is proposed that the interest thereon should be remitted, so far as it accrued previous to the maturity of the note, and the plaintiffs be allowed to strike from the same the added words. It is sufficient for this court, sitting as a court of law, to decide the questions of law raised at the trial, to say, that such a motion is not before it, and can not be entertained. But it may not be improper to remark, that by the authorities referred to, the general proposition is, that written instruments which are altered, in the legal sense of that term, and are thereby made void, and to allow the note to be placed in the condition in which it was when indorsed, would annul one of the foundations on which the principle rests, to wit, "public policy," to prevent fraud, by not permitting a man to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected.

Exceptions sustained, verdict set aside, and new trial granted.

ALANSON T. FAY ET AL. *v.* WEBSTER SMITH

1 *Allen (Mass.)* 477, 79 *Am. Dec.* 752 (1861).

Contract upon a promissory note, signed upon its face by H. M. Reed, bearing upon its back the name of the defendant, payable in ten months from date to the order of Joshua Hobart, and indorsed by Hobart to the plaintiffs. The answer set up a material

alteration of the note after the defendant's name was put upon it, by the addition of the words "with interest," but it was not alleged, or contended at the trial, that this alteration was made with fraudulent intent. At the trial in the superior court, Putnam, J., ruled that, even if the fact set up in the answer was proved, the plaintiffs were entitled to recover the amount of the principal, with interest after the expiration of ten months, and a verdict was returned accordingly. The defendant alleged exceptions.

Hoar, J.: The defendant, not being named as a party to the note in suit, placed his name upon the back of it, before it was delivered by the promisor, Reed, to the payee, and thereby, according to the settled law of Massachusetts, made himself jointly liable as an original promisor. The note, when he thus placed his name upon it, was not payable with interest; but the other promisor had agreed with the payee to give him a note bearing interest, and the words "with interest" were added by the procurement of the payee, and with the assent of Reed, but without the knowledge or authority of the defendant; and with this alteration the note was taken by the payee and indorsed to the plaintiffs.

The plaintiffs contended at the trial that, the alteration having been made without fraudulent intent, they should be allowed to recover upon the note as it stood when the defendant signed it; and the presiding judge so ruled. But we are of opinion that this ruling can not be supported, and that the verdict must be set aside, and a new trial granted. We think no case has gone so far in this commonwealth as to hold that, where a material alteration in a contract has been made by the payee or obligee, with the express intention of changing the operation of the contract itself, and of making it in terms a different contract, it could afterward be enforced, even in the absence of any fraudulent intent. But whether this be so or otherwise, in a case in which the alteration is made after the delivery of the writing, the case at bar must be governed by principle which depends upon wholly different considerations.

This note is a contract in writing, and purports to be the contract of both Reed and the defendant. If both are bound by it, it is the same contract by each of them. The writing is single, and can not be treated as if it contained two separate agreements, one binding upon the one and the other upon the other. The payee never received it, or agreed to receive it, as a note not bearing interest. He took it as a note payable with interest, having the signature of Reed appended to it as such, and delivered by Reed to him as an effectual contract according to its tenor. He knew that, as it was signed by the defendant, it was not a note bearing interest; and he assumed that Reed had authority to make the defendant a party to the new contract, which the insertion of the words "with interest" constituted. But Reed had not such authority; and the contract which the payee of the note received does not therefore bind the defend-

ant. The defendant never made the note which the payee accepted.

There seems to be no difference in principle between this case and the one where a note should be signed by two persons for the sum of three hundred dollars, and one of them, supposing he had authority from the other, but really without his consent, should strike out the words "three hundred dollars," and insert in their place "five hundred dollars," and then negotiate the note. The other signer would be wholly discharged, not on the ground of fraud and forgery, but of want of authority to bind him. The note used he did not execute; the note which he executed was never used, but was destroyed by the alteration, and another substituted for it.

The plaintiffs' declaration shows that they rely upon a different contract from the one which was signed by the defendant, the only contract to which he ever assented; and if the words "with interest" could be stricken out and treated as nullity, there would be a variance between the declaration and the proof.

New trial granted.

JOHN S. CHADWICK *v.* ENOS EASTMAN ET AL.

53 *Maine* 12 (1864).

WALTON, J.: This is an action of assumpsit, and, to support it, the plaintiff read in evidence a note of the following tenor:

"BANGOR, April 19, 1861.

"At five days sight, value received of Charles O. Fanning, we, or either of us, promise, jointly and severally, to pay him or bearer, thirteen hundred and sixty-five dollars and thirty-five cents, with interest from date. For ENOS AND WM. EASTMAN,
"WM. L. EASTMAN."

The defendants contended, and introduced evidence tending to prove, that the words, "for Enos and Wm. Eastman," were inserted in the note by the payee, after its execution, and without the knowledge or consent of defendants, it would be such an alteration as would avail the defendants to avoid the note in this suit.

To this instruction the plaintiff excepted, and his counsel contends, in a very able and instructive argument, that the exceptions ought to be sustained and a new trial granted. He says that the defendants were copartners, and that the note in suit was given for a copartnership debt; that Wm. L. Eastman had the power, and that the language of the note, "we, or either of us, promise," etc., shows that he intended to bind his copartner as well as himself; that the law will give effect to this intention, by holding Enos as a joint promisor upon the note in its original form, or by giving the

payee authority to add sufficient for the purpose; that, if the former be the correct view, then the alteration was immaterial—if the latter, then the payee had authority to make it; that the intention to bind Enos, which he contends is apparent upon the face of the note, renders the alteration immaterial or impliedly authorized; and that, upon either view, the plaintiff is entitled to judgment against both defendants for the amount of the note.

1. Was the insertion of the words "for Enos and Wm. Eastman," a material alteration of the note? Of this we can not entertain a doubt. Without these words the note would not be evidence that Enos Eastman was in any way holden upon it. We are not now asserting that he would not be holden upon it—we are only asserting that the note itself would be no evidence of it—that his liability, if established at all, would have to be made out by evidence dehors the note. But, with these words in, the note itself establishes his liability, prima facie. It is very clear, therefore, that the insertion of the words "for Enos and Wm. Eastman," changes the effect of the note as an instrument of evidence, and makes it prove more than it otherwise would. "Any alteration which changes the evidence or mode of proof is material." 2 Parsons on Bills and Notes, 564.

2. Was the form of the note such as to authorize the payee to insert the words "for Enos and Wm. Eastman?" Was it apparent upon the face of the note that Wm. L. Eastman intended by his own signature to bind his copartner? We think not. On the contrary, the form of the note excludes such an inference. It is in form a joint and several note, and a partner can not bind his copartner severally. The true inference to be drawn from the form of the note is, that it was made to be signed by two persons, not that two persons were to be bound by the signature of one; and that, for some cause, the signature of the second was not obtained. The note itself does not disclose a partnership, the language being such, in one respect, as a partner could not properly use. We refer to the words implying a several liability. Nor does it disclose the fact that it was given for a partnership debt. Surely consent to make the alteration is not implied in the form or language of the note.

But we do not see that any point of law, arising out of this question of implied consent, is open to the plaintiff. Consent, whether express or implied, was a fact to be found by the jury; and the presiding judge does not appear to have made any rulings unfavorable to the plaintiff in relation to it. He told the jury what the consequences would be if the alteration was made without consent; but, so far as appears, he left the question whether there was or was not consent, to the jury, unembarrassed by any rulings unfavorable to the plaintiff. It is unnecessary, therefore, to discuss this branch of the case further. 2 Parsons on Bills and Notes, 565.

3. If, then, the alteration was a material one, and was made by the payee after the execution of the note, and without the knowledge or consent of the defendants, was it such an alteration as would avail the defendants to avoid the note in this suit?

Tampering with documentary evidence is not to be encouraged. It is the right of every one to have his contracts remain as he has made them. If error has accidentally crept into a written contract, a court of equity, in proper cases, will correct it. But the law does not allow one of the parties, without the consent of the other, to do it.

It was held in Pigot's case (11 Coke 27) that, when a deed is altered in a point material, without the privity of the obligor, it thereby becomes void. The reason of the rule is, that a man shall not take his chance of committing a fraud, and lose nothing by it in case he is detected. The rule was extended, in Master v. Miller (4 T. R. 320), to all written instruments; and affirmed in the same case on writ of error (5 T. R. 367), and ever since followed by the English courts; and the rule is believed to be universally adopted in this country, wherever the common law prevails. To have this effect, the alteration must be material. The insertion of a word which the law itself would supply, though done without the consent of the other party, is immaterial, and will not invalidate the instrument, because its legal effect is not thereby changed.

It is said, in Chitty on Bills, 85, that an alteration to correct a mistake does not vitiate a bill of exchange; and this remark seems to have given rise to an erroneous belief in the minds of some. In all the reported cases on this point, it appears that the alterations were made by consent, and the remark, that such an alteration does not invalidate the instrument, had reference to the stamp law, and meant no more than that an alteration, by consent, to correct an error, would not require a new stamp. It is erroneous to suppose that one of the parties may lawfully alter an instrument, even to correct an error, without the consent of the other. The other may deny that there is any error, and the holder of the instrument can not lawfully take upon himself the decision of that question. (2 N. H. 545.)

The correct doctrine is, that any alteration which changes the legal effect of the instrument, either in its terms, or the parties, or as an instrument of evidence, is material; and, if made by the holder, without the consent of the other party, will invalidate it. This is a wise rule of law, and sound policy requires its stringent enforcement.

The alteration of the note in suit was material, and, so far as appears, wholly unauthorized; and we think the presiding judge did right in ruling that it was such an alteration as would avoid the note.

Exceptions overruled.

Judgment on the verdict.

Appleton, C. J., Cutting, Kent, Barrows and Danforth, JJ., concurred.

See also Wood v. Steele, 6 Wall. (U. S.) 80, 18 L. ed. 725; Eckert v. Louis, 84 Ind. 99; Fulmer v. Seitz, 68 Pa. St. 237, 8 Am. Rep. 172.

NEWMAN ET AL. *v.* KING

54 *Ohio St.* 273, 43 *N. E.* 683, 35 *L. R. A.* 471, 56 *Am. St.* 705 (1896).

Bradbury, J.: The promissory note, the subject of this action, was executed by Ida Newman, Martha Martin and George Martin, and delivered to the payee, J. C. Frampton. By successive indorsements made in due course of business and before due, the note was transferred to defendant in error, Charles J. King, for value. The makers of the note answered, contesting, among other defenses, its validity, on the ground that the payee, after its delivery to him, and without their consent and knowledge, altered its date from June 22, 1890, to June 23, 1890. This was denied by the holder of the note, defendant in error, in his reply. Upon the issue thus arising, and after the testimony bearing thereon had been given to the jury, the holder of the note, defendant in error, requested the court to charge the jury as follows:

"If the jury find from the evidence that J. C. Frampton did alter the date of this note from June 22, 1890, to June 23, 1890, and further find that such alteration was only for the purpose of making the note bear its true date, and that such alteration did in fact make such note bear its true date, then such alteration is an immaterial alteration, and is not a good defense in this action," but the court refused to so charge as requested, to which refusal the plaintiff at the time excepted.

Thereupon the court charged the jury upon this point as follows: "Now I say to you as a matter of law in this case, gentlemen, that if you shall find from the evidence in this case that since the defendants signed the note sued upon in this action, the same has been altered by the payee thereof, J. C. Frampton, without the knowledge or consent of either of these defendants, by changing the date thereof from June 22 to June 23, that such alteration and change would, in law, amount to and would be a material alteration, and such alteration would render the note void as to these defendants, and would operate to discharge them from all liability thereon, although you may believe from the evidence that the plaintiff took the note in the regular course of business before due, for a valuable consideration and without notice of such alteration." To which charge as given the plaintiff at the time excepted.

The verdict and judgment were against the validity of the note. This judgment the circuit court reversed on the ground, among others, that the court of common pleas erred in refusing to charge the proposition requested, and in charging as it did upon the subject. This is the only question arising on the record of sufficient importance to require attention. That the date borne by a promissory note is a material matter is not seriously contested. That it is material, we think, clear upon both reason and authority, the time of payment and the bar of the statute of limitations both depend upon its date. If the date of a promissory note may be changed one day, why not two days? If two days are not material, what number shall be held material? No satisfactory answer can be made. By changing its date the identity of the instrument is destroyed, and it is no longer the contract made by the parties. Bowers v. Jewell, 2 N. H. 543; Wood v. Steele, 6 Wall. 80; Inglish v. Breneman, 5 Ark. 377; Miller v. Gilleland, 19 Pa. St. 119; Brown v. Straw, 6 Neb. 536.

The authorities bearing upon this proposition are quite numerous, but to cite them further would be a work of supererogation.

If by reason of the alteration it has ceased to be the contract of the parties, the defense thus arising is available against an innocent purchaser. Charlton v. Reed, 61 Iowa 166; Cronkhite v. Nebeker, 81 Ind. 319; Haskett v. Champion, 30 Mo. 136; Wood v. Steele, 6 Wall. 80. Other authorities could be cited, but we do not think it at all necessary to support by an extended list of precedents a proposition so obviously consistent with sound reason.

The defendant in error contends that, although the date which a promissory note bears may be a material matter, yet that as the note in controversy, according to the intention of all the parties to it, should have been dated June 23d, instead of June 22d, 1890, an alteration made by the payee honestly and in good faith after its delivery to him, that merely caused the instrument to express the date intended, even if done without the knowledge or consent of the makers, would not render the note void. This contention finds support from reputable authorities. In Decker v. Franz, 7 Bush (Ky.), 273, a promissory note had been dated in 1868, and the payee altered the date to 1890 by changing the figure "8" to "9" without the knowledge or consent of the maker. The court maintained the validity of the note on the ground that in its altered condition it conformed to the intention of the parties. The same doctrine is maintained in Mississippi. McRaven v. Crisler, Admx., 53 Miss. 542; in Maine, Hervey v. Harvey, 15 Maine 357. In the latter case, however, great weight was given to the fact that the maker knew of the mistake, while the other parties did not, and the court seemed to be of opinion that his attempt to avail himself of the alteration as a defense constituted a fraud upon the plaintiff. Ib. 359; Clute v. Small, 17 Wend. 238; Bowers v. Jewell, 2 N. H. 543.

Other cases, cited as sustaining this doctrine, do not support it to the extent claimed for them.

Thus, in Johnson v. Johnson's estate, 66 Mich. 525, which was an action to charge the estate of the principal maker of a promissory note for the debt evidenced thereby, a note had been given on October 23, 1876, for the balance due on account stated between the parties, but by mistake was dated October 23, 1875. The trial court found that the payee honestly, and with no fraudulent intent, changed the "5" to "6." This was done without the knowledge or consent of the makers. Afterward the principal made two payments on the note, upon which circumstances some stress was placed by the court, although it does not appear that he knew of the alteration, when the payments were made. The wife of Johnson had signed the note as surety. The court seemed to be of opinion that the alteration changed the contract and discharged the wife, for the court said "the fact that Mrs. Johnson was not bound by the note would not discharge her husband for whom she signed as surety." The claim was allowed against the estate of the principal. The reasoning of the court is not very clearly set forth, but sufficient appears to show that the decision was quite as much due to the theory that the original consideration, the account stated, would support the claim as to any other principle, the court saying: "And furthermore the account stated, which was the foundation of the note would form a new basis of indebtedness."

In some cases the alteration was sustained on the ground that it was made by an agent of the maker, or drawer, before delivery. Brett v. Pecard, Ryan & Moody, N. P. 37; Van Brunt & Slaight v. Eoff, 35 Barb. (N. Y.) 501. In other cases the note or bill of exchange was held valid, notwithstanding the insertion of a word without the knowledge of the maker or drawer, upon the ground that the word inserted was implied by the contents of the instrument.

The question raised by the instructions given and refused, relate solely to the effect to be given to a promissory note, after its date has been altered by the payee without the knowledge or consent of the maker.

The question is one of public policy. Doubtless, all minds will concur in the proposition that after a written instrument has been altered in a material matter, it no longer retains its identity; it is in fact a new contract, and imposes obligations and secures rights different from those it imposed or secured at its origin. Nor will any reasonable mind contend that one of the parties to a written instrument may alter it without the consent of the others so that it will express anything not intended by the parties. The contention is, however, that it may be altered by one party alone without the knowledge or consent of the others, if in its altered condition, it conforms to the intention of the parties, and the alteration was

honestly made; and that, that being true, it may be enforced in its altered condition. The reasoning is that, as, in its changed condition, it expresses the intention of the parties, no injury has been done by the alteration. That, no doubt, is true in every case of an alteration in so far as it concerns the parties affected by it. If, in its altered state, it requires the obligor to do the particular thing he agreed to do, no personal wrong has been inflicted on him. In this view of the matter the number and extent of the alterations are immaterial, for, however great and numerous they may happen to be, the instrument in its changed condition requires the obligor to do just what he promised, and therefore, in good conscience, ought to do. The question, however, does not rest solely upon this aspect of the matter. Regard should be had to the policy of maintaining the integrity of written instruments; particularly those whose character, or nature, is such that their possession and custody belong to one party only.

Promissory notes are of this class. This policy, we think, denies to the custodian of a written instrument, to whose possession its nature necessarily confides it, the power to alter its terms in any material matter whatever, in order that it may conform to his notion of what the parties intended when it was executed.

Deliberate tampering with written instruments by their obligees upon any pretense whatever should not be encouraged. If the right to do so in respect to any material matter should be established, the principles by which satisfactory limits can be fixed to such right are not apparent. And if established, the nature of the right is such that probably it would be rarely exercised by the prudent and conscientious custodian of a written instrument in any case; but instead it would be used chiefly if not altogether by those at whose hands its exercise would be fraught with peril to the integrity of written instruments, namely those who, if not actually unscrupulous, are at least regardless of the rights of others.

Where, by mistake, a written instrument does not conform to the intention of the parties, and they can not agree respecting the mistake and its correction, an adequate remedy has been provided according to the principles of equity jurisprudence, by courts having jurisdiction to correct such mistakes where rules of evidence appropriate to establish the fact of mistake are prescribed and enforced.

In this state an alteration appearing on the face of a promissory note is presumed to have been made at or before the time of its execution, and the burden of proof is cast upon one who seeks to establish the contrary. Franklin v. Baker, 48 Ohio St. 296; and this seems to be the rule that generally prevails throughout the United States. Bailey v. Taylor, 11 Conn. 531; Speake v. U. S., 9 Cranch 37; Wickes v. Caulk, 5th Harr. & John 36.

This presumption, that an alteration appearing on the face of

a written instrument was made at or before its execution, is an additional and obvious reason for denying to the custodian of any instrument to which the presumption applies, any authority to change its terms in a material respect.

Otherwise a party by his own act may change the burden of proof and thus deprive the other party of a valuable right. Before the alteration was in fact made, should he have sought a correction through the medium of a court of justice, the burden would have rested upon him to establish the mistake by clear and convincing evidence. Having made the alteration, when, perhaps years afterward, he seeks the enforcement of the instrument in its altered state, this ex parte act, by its inherent force, raises a presumption that the alteration had been made at or before its execution, and thus the burden of establishing the fact that the alteration was made afterward, is thrown upon the party who alleges it.

We are not at this time concerned as to the effect that a material, though innocently made, alteration of a written instrument may have upon the rights of the beneficiary in it, to recover on account of the original consideration moving between the parties, nor with his right to restore the instrument to its original condition and to enforce it when thus restored. Because the only question raised by the record relates to the right to recover upon the instrument itself in its altered condition; for the instructions given and refused by the trial court, to which exceptions were taken, bore upon this last question only.

The action was brought by an indorsee who sought a recovery upon the instrument itself. The makers denied that the instrument was the one they had executed, because its date had been altered without their knowledge or consent. This was the issue to which the instructions in controversy relate, and we think the court of common pleas laid down the correct rule upon the subject. The view we have adopted finds support among the text writers, and in the decisions of courts of high authority. Inglish v. Breneman, 5 Ark. 377; Charlton v. Reed, 61 Iowa 166; Wood v. Steele, 6 Wall. 80; Haskell v. Champion, 30 Mo. 136-138; 1 Thompson on Trials, § 1395; Evans v. Foreman, 60 Mo. 449; Moore v. Lessee of Bickham & West, 4 Binn. 1; Miller v. Gilleland, 19 Pa. St. 119.

However, the judgment of reversal was not placed solely upon the ground of error in the charge given and refused, but rested, also, upon the action of the court of common pleas in excluding evidence offered by the defendant in error, plaintiff below, which evidence we think was material and competent.

Therefore, the judgment of reversal was correct and will be affirmed.

Judgment affirmed.

ALDOUS *v.* CORNWELL

L. R. 3 Q. B. 573 (1868).

Declaration, that the defendant, on the 8th of November, 1865, by his promissory note, promised to pay the plaintiffs £125 on demand.

Plea, that the defendant did not make the note, as alleged.

At the trial, before Shee, J., at the sitting in London after Trinity Term, 1865, the following promissory note, signed by the defendant, was put in:

"On demand. November 8th, 1865.

"I promise to pay Mr. Ed. Aldous the sum of £125."

But it was proved that the promissory note, when delivered to the plaintiff, did not contain the words "on demand," and that these words had been inserted while the note was in the possession of the plaintiff, the payee, without the knowledge of the defendant, but there was no positive evidence to show by whom the alteration was made.

The learned judge directed a verdict for the plaintiff, reserving leave to move to enter a verdict for the defendant, if the note was rendered void by the alteration.

A rule having been obtained accordingly, on the ground that a material alteration had been made in the note after it was given.

The judgment of the court (Cockburn, C. J., Blackburn and Lush, JJ.) was delivered by Lush, J.

This was an action by the payee against the maker of a promissory note, expressed to be payable on demand. The plea denied the making of the note.

At the trial before the late Mr. Justice Shee it was proved that the words "on demand" were added after the note had been delivered to the plaintiff. It did not appear who made the alteration, but it was assumed to have been made by the plaintiff, and no question was raised as to this fact. The learned judge directed a verdict for the plaintiff, reserving the point whether by such an alteration the note was rendered void. No objection having been made to the pleadings, we must consider the case as if the question had been properly raised on the record.

It was admitted, and properly so, on the argument, that the addition of these words did not alter the legal effect of the instrument, but only tended, upon the authority of Pigot's Case, 11 Rep. 26 b, and Master v. Miller, 4 T. R. 320, 1 Sm. L. C. 796, that the alteration, having been made by the payee and holder, though in a matter not material, avoided the instrument.

In Pigot's Case, 11 Rep. at fol. 27 a, it is said, "If the obligee himself alters the deed by any of the said ways (viz., by interlinea-

tion, addition, erasing, or by drawing a pen through the line, etc.), although it is in words not material, yet the deed is void, but if a stranger, without his privity, alters the deed by any of the said ways, in any point not material, it shall not avoid the deed." For this proposition, Dyer, 9 Eliz., fol. 261 b, is cited. Shep. Touch., Vol. 1, p. 68, is to the same effect. It was found as a fact in Pigot's Case that the alteration, which was not a material one, was made by a stranger, and judgment was given for the plaintiff, so that the case itself is not a decision upon the point in question. Master v. Miller extended the doctrine, as regards material alterations, to bills of exchange; and subsequent cases have applied it indiscriminately to all written instruments, whether under seal or not; see Davidson v. Cooper, 11 M. & W. 778; in error, 31 M. & W. 343. No authority was cited, nor are we able to find one, in which the doctrine has been acted upon, and an instrument held to be avoided by an immaterial alteration. There are cases to the contrary, though we can not regard them as entirely satisfactory. Thus in Lord Darcy and Sharpe's Case, 1 Leon. 282, an alteration in a bond not material made by the executor of the obligee was held not to vitiate the bond. But the court seemed to lay stress on the fact that the alteration was in favor of the obligor.

In Sanderson v. Symonds, 1 B. & B. 426 (E. C. L. R., Vol. 5), the holder of a policy of insurance on a ship on a voyage to the coast of Africa, during her stay there, and back to Liverpool, with liberty to "touch and stay at any port or places to sell, barter, and exchange, and load, and unload, and reload, at any of the ports and places she may call at," had, fearing that these words might not be sufficiently extensive for his purpose, added after the words "during her stay," the words "to trade." Several of the underwriters had initialed the alteration, but the defendant refused to do so, on the ground that he never underwrote trading policies to Africa, and he offered before loss to cancel his subscription and return the premium, rather than assent to such an alteration. The plaintiff refused to accept this offer, and held to the policy. The ship was afterward lost, and the plaintiff sued the defendant for his subscription; the defendant resisted the action on the ground that the alteration avoided the policy so far as he was concerned. It is to be observed here that both parties thought the alteration material at the time it was made. The court, however, held that the words so added expressed no more than was already contained in the policy as signed by the defendant, and therefore that the defendant was not discharged. This case might have been cited as conclusive upon the question before us, but for the reasons assigned by the different members of the court for their judgment. Dallas, C. J., 1 B. & B. 429, said that the rule was intended not so much to guard against fraud as to insure the identity of the instrument, and prevent the substitution of another without the privity of the party concerned.

"But the present case," he said, "stands on its own circumstances. The instrument is a policy of insurance signed by a number of individuals wholly unconnected in interest, and between whom no privity can exist. Indeed, it has never been contended that this was an alteration without the privity of the party; and the old cases turn entirely on alteration made without the privity of the party. Here the instrument was shown to all the parties concerned. Those who put their initials to the alteration thereby signified their consent to it; those who refused to do so expressed their denial by the absence of their initials. But the latter were bound by the policy as it stood at the first, the former by the policy in its altered state." Park, J., 1 B. & B. 431, said: "In all the cases on policies the court refers to the materiality of the alterations. The alteration here is immaterial, the risk stands as it stood before, and the writing immaterial words does not vacate the policy." And Burrough and Richardson, JJ., base their judgments on the fact that the risk was not varied by the alteration.

Had the alteration in that case been a material one, the fact that some of the underwriters had assented to it, and that it had been shown to those who expressed their assent, would not have prevented the operation of the rule as against the latter. This had been decided in two prior cases in the same court, Langhorn v. Cologan, 4 Taunt. 330, and Fairlie v. Christie, 7 Taunt. 416 (E. C. L. R., Vol. 2), in each of which the dissentient underwriters had been held to be discharged by a material alteration in the policy, though they had been asked to join others who had assented, and had refused to do so. The judgment of Dallas, C. J., can not therefore stand upon that ground, and it is obvious the real ground of the decision in Sanderson v. Symonds, 1 B. & B. 426 (E. C. L. R., Vol. 5), was that the defendant was not, and could not, be prejudiced by the alteration. Why the court should have limited the doctrine they there laid down to policies of insurance, it is not easy to understand. We can not discover any reason for making a distinction between that and any other species of contract.

Another case is that of Catton v. Simpson, 8 A. & E. 136 (E. C. L. R., Vol. 35); there the plaintiff had joined the defendant as his surety in a joint and several promissory note. The payee, having pressed the defendant for payment, had consented to give time on his procuring a third person to add his name to the note. The plaintiff, who had afterward paid a moiety of the amount, sued the defendant for repayment, and it was objected that, as the name of the third party had been added without the plaintiff's consent, he had been discharged, and had paid the money in his own wrong. Patteson, J., who tried the cause, directed a verdict for the plaintiff; and the court refused a rule for a new trial, holding that "it was not an alteration of the note, but an addition which had no effect." It is true that in the subsequent case of Gardner v. Walsh, 5 E. & B. 83

(E. C. L. R., Vol. 85), 24 L. J. Q. B. 285, this court, expressly overruled Catton v. Simpson, 8 A. & E. 136, not, however, on the ground that an immaterial alteration vacated the instrument, but on the ground that the alteration was a material one.

This being the state of the authorities, we think we are not bound by the doctrine in Pigot's Case, 11 Rep. 27 a, or the authority cited for it; Dyer, 261 b, and not being bound, we are certainly not disposed to pay it down as a rule of law that the addition of words which can not possibly prejudice any one destroys the validity of the note. It seems to us repugnant to justice and common sense to hold that the maker of a promissory note is discharged from his obligation to pay it because the holder has put in writing on the note what the law would have supplied if the words had not been written. We therefore discharge the rule.

Rule discharged.

M. F. SAWYERS, ADMINISTRATRIX, *v.* A. L. CAMPBELL ET AL., APPELLANTS

107 *Iowa* 397, 78 *N. W.* 56 (1899).

Robinson, C. J.: The note in suit is dated January 1, 1896, and is for the sum of one thousand dollars, payable to the plaintiff or order six months after its date, with interest. It was signed by the defendants O. J. Houston and D. B. Lyons, and by the defendants and appellants A. L. Campbell, F. A. Percival and Thomas Hatton. As originally drawn and signed, it was in form an ordinary negotiable promissory note, but before it was delivered there was written across its face the following: "Upon the written request of all the makers of this note, made on or before June 15, 1896, the payee agrees that the time of payment shall be extended six months from the maturity thereof or note renewed for that time." The petition alleges that a request for the renewal of the note was not made, and demands judgment for the amount of the note against all its signers. The appellants filed an answer, in which they alleged that Houston and Lyons "alone were the makers of and principals upon" the note, and that the appellants were sureties only, which fact was at all times known to the plaintiff, and that the note was given under circumstances and upon conditions as follows: In January, 1896, the plaintiff owned a judgment rendered in her favor against Houston and Lyons, and the appellants were sureties on a supersedeas bond filed in the cause in which the judgment had been rendered. The note in suit, after it had been signed by the defendants, was left with Houston and Lyons for immediate delivery upon condition that the judgment, with interest and costs, should be paid forthwith, and satisfied of record, and the appellants be released from all liability

on account of it. The note was not immediately delivered, but was held until March 26, 1896, without the knowledge or consent of the appellants, and was then delivered to the plaintiff, without having the judgment, including costs, paid in full. The appellants further allege that the provision written across the face of the note was so written without their knowledge or consent, and effected a material alteration in the note, and that by reason of the matter pleaded they are released from liability on the note.

* * * * * * *

The chief contention of the appellants is that the provision written across the face of the note was a material alteration of the note, that it was made without their knowledge or consent, and that, in consequence, they are released from liability on the note. It will be observed that the provision, by its terms, was not to be effective unless "upon the written request of all the makers" of the note, made on or before June 15, 1896. It is said that the word "makers" did not include sureties, but the principals alone, and that the provision therefore gave to the principals the right to an extension or renewal of the note without the consent of the sureties. The argument in support of the claim that the word "makers" was not designed to include sureties is ingenious, but not convincing. Notes may be made by both principals and sureties, as was done in this case, and the fair and reasonable conclusion to be drawn from the words "all the makers of this note" is that they were intended to refer to all persons who had signed the note. If the meaning could be regarded as ambiguous, undisputed evidence shows that the words were intended to include the sureties. The provision was written on the face of the note without the knowledge or consent of the appellants, and, if material, and it has not been ratified, they are discharged from liability on the note. It is said that the effect of the provision was to make the note non-negotiable. "An alteration, to be material, must be in a material part of the instrument, and affect the rights and liabilities of the parties thereto. * * * And unless the alteration changes the legal effect of the instrument—i. e., makes it express a contract different from that which was entered into by the parties thereto—it will not be material." 2 Am. & Eng. Enc. Law (2d ed.) 222. See also Rowley v. Jewett, 56 Iowa 492. The intent with which an immaterial alteration is made is not material. Robinson v. Insurance Co., 25 Iowa 430. It is said in 1 Greenleaf Evidence, § 565, that any alteration which causes a written contract to speak a language different in legal effect from that it originally spoke is material. The grounds for the rule are stated to be: First, that of public policy, to prevent fraud; and, second, to insure the identity of the instrument. In State v. Stratton, 27 Iowa 420, it was held that the removing from the bottom of a promissory note for twenty-five dollars of a provision in words as

follows: "When the said Brown (maker) sells fifty dollars' worth of water elevator, and pays twenty-five dollars, this note to be considered paid,"—was a material alteration. See also Benedict v. Cowden, 49 N. Y. 396. In Needles v. Shaffer, 60 Iowa 65, the substitution of the word "bearer" for "order" was held to be a material alteration. An extension of time is a material alteration. Bonney v. Bonney, 29 Iowa 448; Roberts v. Richardson, 39 Iowa 290. The same is true of a change in the time for paying the interest (Marsh v. Griffin, 42 Iowa 403; Coburn v. Webb, 56 Ind. 96) and of the addition of others signers (Hamilton v. Hooper, 46 Iowa 515; Berryman v. Manker, 56 Iowa 150; Sullivan v. Rudisill, 63 Iowa 158). The same is true of the addition of the word "cashier" to the name of the payee. Hodge v. Bank, 7 Ind. App. 94 (34 N. E. Rep. 123). See also Charlton v. Reed, 61 Iowa 166. The words, "all terms and conditions included in above approved, read and agreed," written over the signature of a party to a written proposal, have been held to constitute a material alteration. Publishing Co. v. Fisher, 10 Utah 147 (37 Pac. 259). The words "privilege of extension for thirty days after maturity given," inserted at the bottom of a promissory note, and above the signature, effect a material alteration. Flanigan v. Phelps, 42 Minn. 186 (43 N. W. 1113). See also Bank v. Piollet (Pa. Sup.), 17 Atl. 603. The alteration in each of the cases referred to, from the time it was made, purported to be in force, and a part of the instrument, and not a mere offer of a change, which, to be effectual, required an acceptance by the persons to whom it was made. That is also true of the alteration involved in Bank v. Laughlin, 4 N. D. 391 (61 N. W. 473), which consisted in the words "agreeing to pay all expenses incurred by suit or otherwise in attempting the collection of this note, including reasonable attorneys' fees," inserted in a note after it was made and delivered. It was said in that case to be settled that the alteration of a note non-negotiable in form, so as to invest it with the form and guise of negotiable paper, is a material alteration. "The qualities essential to a negotiable promissory note are that it shall possess certainty as to the payor, the payee, the amount, the time of payment, and the place of payment." Smith v. Marland, 59 Iowa 645. See also Miller v. Poage, 56 Iowa 96; Woodbury v. Roberts, 59 Iowa 348; Gordon v. Anderson, 83 Iowa 224; Culbertson v. Nelson, 93 Iowa 187. It is said in Tiedeman Commercial Paper, §§ 394, 395, that any alteration is material which changes the liability of the parties in any way; that the alteration avoids the paper, whether it is favorable or unfavorable to the party making the alteration, for the reason that the alteration affects the identity of the paper, and avoids it and that an alteration is immaterial whenever it does not change the legal effect of the instrument. We are of the opinion that the better rule sustained by both reason and authority is that an alteration which does not destroy the identity of a written instru-

ment, nor in any manner affect the liability thereon of the surety, is not such an alteration as will release the surety. Bank v. Hyde, 131 Mass. 77; Bucklen v. Huff, 53 Ind. 474; Barber v. Burrows, 51 Cal. 404; 2 Brandt Suretyship (2d ed.), § 370; 2 Daniel Negotiable Instruments (4th ed.), §§ 1313, 1322. The provision in question did not purpose to affect the terms of the note, nor the liabilities of its signers. It was in the nature of an offer to extend the time for the payment of the note, or to renew it, on condition, however, that all the signers should unite in a written request for the extension or renewal. Until that should be done, the provision was, as to the liability of the signers, wholly without effect, and it could not have affected them in any manner without a request in writing by them. The right of the sureties to enforce payment by the principals at the maturity of the note remained intact. To release the sureties under these circumstances would be unjust and unauthorized. See Jackson v. Boyles, 64 Iowa 428. The views expressed dispose of the controlling questions in the case. We do not find any ground for disturbing the judgment of the district court, and it is affirmed.

See also Tranter v. Hibberd, 108 Ky. 265, 56 S. W. 169.

Contra: Haskell v. Champion, 30 Mo. 136; McCormack Harvesting Mach. Co. v. Blair, 146 Mo. App. 374, 124 S. W. 49.

An immaterial alteration even though fraudulent will not avoid the obligation. Moye v. Herndon, 30 Miss. 110.

Material Alteration Defined by Negotiable Instrument Code

General Code of Ohio

Section 8230. Any alteration is a material alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made; or which adds a place of payment when no place is specified; or any other change or addition which alters the effect of the instrument in any respect.

JONES *v.* BANGS

40 *Ohio St.* 139, 48 *Am. Rep.* 664 (1883).

Martin, J.:[1] The makers and payee of each note are the same. For convenience we will consider the note which reads:

[1] Statement of facts omitted.

"$1,000. CHILLICOTHE, OHIO, February 18th, 1873.

"One year after date we, or either of us, promise to pay to the order of Mrs. J. J. Bangs one thousand dollars, for value received—with ten per cent. interest from date.

"C. B. THOMPSON,
"WM. A. JONES,
"J. P. STEELEY,
"A. W. THOMPSON."

The answer of the surety Jones merely alleges that after he signed the note it was altered, without his consent, by the addition of the words "with ten per cent. interest from date." By whom and when, whether before or after delivery, or with or without the knowledge of the principal or payee, is not stated. The plaintiff making no objection to the answer on account of this indefiniteness, put in a reply amounting to a general denial. On this issue alone the case went to a jury and testimony was given tending to show an alteration as charged in the answer. The defendant requested an instruction to the jury to the effect that if they found that the note had been altered as stated in the answer, then the note sued on was not the note he signed and the plaintiff can not recover. This instruction the court properly refused to give. The charge given was "that if the note was altered before delivery to the payee without her knowledge or consent, such alteration will not affect its validity in her hands."

The only questions to be decided arise upon this charge. As applied to the note under consideration, the charge is to the effect that a material alteration of a complete note, made by the principal maker, before delivery and without the knowledge of the surety, does not discharge the surety, unless such alteration was made with the knowledge, consent or procurement of the payee. We think this charge is manifestly erroneous. We are sustained in this view by numerous well-considered adjudications: in New York, McGrath v. Clark, 56 N. Y. 34; Connecticut, Ætna National Bank v. Winchester, 43 Conn. 391; Massachusetts, Draper v. Wood, 112 Mass. 315; Pennsylvania, Fulmer v. Steitz, 58 Pa. St. 237; Maine, Waterman v. Vose, 43 Maine 504; Michigan, Bradley v. Mann, 37 Mich. 1; Indiana, Schuewinde v. Hacket, 54 Ind. 248; Missouri, Frigg v. Taylor, 27 Mo. 245.

Many other authorities bearing directly on the point, from the same and other states, are cited in the able brief of counsel for plaintiff in error. The alteration was certainly material. When it was signed by the surety the note bore no interest before maturity, and was for the payment of $1,000 and no more when due. As altered it drew interest from date and was for the payment of $1,060 at maturity. It may be well to remark (although it is not an important circumstance) that the note is joint and several. The principal

was not a party to the action; and the plaintiff planted her case on the several promise of the surety. If the surety is bound, it is because of his promise. There is no intimation in the record that his alleged liability was assumed otherwise than by his written promise. When he signed and handed the note to his principal, he thereby authorized its delivery as it was then written. And he would have been bound accordingly to the payee or any subsequent bona fide holder.

By the subsequent alteration its identity was lost, and there arose another and distinct obligation which he had not signed. To hold him bound by the new contract he must, in some way consistently with legal principles, be concluded by the act of his principal or other person in making the alteration. He may be thus concluded by authority previously given, or by subsequent ratification, or by conduct on his part raising an estoppel. There is no claim made of subsequent ratification. And there is no suggestion of authority other than the mere fact that he entrusted the paper to his principal for negotiation. The principal had the custody of the note with authority to deliver it. If the surety had parted with the note, leaving a blank for the insertion of the amount or other material part, the custody of the note would have carried with it unrestricted authority to fill the blank accordingly. Fullerton v. Sturges, 4 Ohio St. 599. In this instance there was no blank to be filled. The surety carefully fixed in writing all the terms of his contract—the day of payment and the precise amount he was to pay. The note was complete when it left his hands, and conferred no authority on anybody to alter it.

Did the conduct of surety estop him from saying that the alteration was without his consent? The record of his conduct is brief. He signed the note at the request of his principal, and handed it to him for delivery to the payee. This is all of it. It was a single transaction incapable of being misunderstood.

It is claimed by learned counsel for the defendant in error that the surety here falls within the rule, "Whenever one of two innocent parties must suffer by the act of a third, he who has enabled such person to occasion the loss must sustain it."

The application of this rule to the unauthorized alteration of a complete note by one of the promisors, before delivery, and without the knowledge of the other, is expressly denied in McGrath v. Clark and Ætna Nat. Bank v. Winchester, supra.

The construction of an instrument may, it is true, be so faulty as to afford exceptional facilities for alteration. And in such case negligence to some extent may be imputed to the maker. He may possibly be said to have enabled his comaker to commit the forgery. Every such case must stand on its own peculiar circumstances. In this record, however, we see no evidence of negligence on the part of the surety.

The alteration consisted of words added at the end of the note.

In what respect was the surety negligent in not anticipating and preventing this crime? He might, it is true, have drawn an elongated scroll from the end of the note before parting with it. If this was his duty, it was likewise his duty to have excluded the possibility of fraudulent alteration on any part of the space within the four corners. A construction of the rule which exacts such suspicious care, and requires the surety to regard his principal as a rogue, is untenable and wholly unsuited to the practical business methods of our people.

The case of Fullerton v. Sturges, supra, is confidently relied on by the defendant in error, as sustaining the position that the participation of the payee in a material alteration, before delivery, is necessary to avoid the note as to a surety who had no knowledge of, and had given no authority to make, the alteration. As we understand that case, the alteration consisted in affixing a seal to the name of the surety before delivery and was wholly immaterial. Therefore, all that was said by the eminent judge who delivered the opinion on the law relating to a material alteration, is obiter. * * *[2]

Judgment of the district court reversed.

See also Bank of Herington v. Wangerin, 65 Kans. 423, 70 Pac. 330, 59 L. R. A. 717; Hill v. O'Neill, 101 Ga. 832, 28 S. E. 996.

Effect of Alteration Under Negotiable Instruments Code

General Code of Ohio, § 8229. When a negotiable instrument is materially altered without the assent of all parties liable thereon, it is voided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

Cf. National Exchange Bank v. Lester, 194 N. Y. 461, 87 N. E. 779, 21 L. R. A. (N. S.) 402n, 16 Ann. Cas. 770.

HACKETT *v.* FIRST NATIONAL BANK OF LOUISVILLE

114 *Ky.* 193, 70 *S. W.* 664 (1902).

Opinion of the court by Judge Hobson—affirming.

Joseph Clark applied to the appellant, J. L. Hackett, to go his surety on a note for $500, payable at the American National Bank of Louisville, Ky. Hackett agreed to do so, and signed the note drawn by Clark for $500, but there was a space left in the note before the words "five hundred" and after them, and Clark filled up the first space with the word "twenty" and the other with the words

[2] Part of opinion omitted.

"and fifty," so as to make the note read as one for $2,550. There was nothing on the face of the instrument to indicate the alteration, and Clark then discounted the note in this condition to appellee, the First National Bank of Louisville, who paid him the money on it without notice of its infirmity. The facts being undisputed, the court properly held that there was nothing to submit to the jury, as simply a question of law was raised as to the legal effect of the conceded facts. It is argued that there was enough on the face of the note to put the bank on notice, but, after a careful examination of the instrument, we are of opinion that this position can not be maintained. In Blakey v. Johnson, 13 Bush 197 (26 Am. Rep. 254), it was held, following Woolfolk v. Bank, 10 Bush 514, that where the drawer of a bill of exchange or the maker of a negotiable note has himself by careless execution of the instrument, left room for insertion to be made without exciting suspicions of a careful man, he will be liable upon it to a bona fide holder without notice, when the opportunity which he afforded has been embraced, and the instrument filled up with a larger amount than it bore when he signed it, on the principle that he invited the public to receive it; and should bear the loss, rather than an innocent purchaser. This case was approved in Newell v. Bank, 13 Ky. Law 775, and in Bank v. Haldeman, 109 Ky. 222 (22 R. 717, 58 S. W. 587), as stating the rule of law correctly. Although the question here raised was not presented in either of these cases they at least evidence the acquiescence of the court in the rule that had been laid down. It is earnestly argued for appellant that the great weight of authority is the other way, and that these cases should be overruled. It is also urged that the question was really not presented in Blakey v. Johnson, but in fact the judgment turns on this question alone, and no other was discussed by the court. The rule so declared is sustained by cases in Pennsylvania, Illinois, Missouri, Louisiana and Alabama. Brown v. Reed, 79 Pa. St. 370 (21 Am. Rep. 75); Yocum v. Smith, 63 Ill. 321 (14 Am. Rep. 120); Bank v. Armstrong, 62 Mo. 59; Isnard v. Torres, 10 La. Ann. 103; Young v. Lehman, Durr & Co., 63 Ala. 519. The decision has remained the law of the state for a quarter of a century. In the meantime business has been readjusted to it, and under the principle of stare decisis, we do not think it ought now to be departed from, for in matters of this kind it is not so important that the law should be rightly settled as that it should remain stable after it is settled; and, as has been well said, "attempts to change the course of judicial decisions under the pretext of correcting errors are like experiments by the quack on the human body. They constantly harass, and often jeopardize it." South's Heirs v. Thomas' Heirs, 23 Ky. 63. Again, in Tribble v. Taul, 23 Ky. 456, the court after stating the same rule said: "In the Supreme Court of a state, as this is, possessing with but few exceptions appellate judicial power coextensive with the

state, the influence which its decisions must have is evident. Its mandates are conclusive, and even its dicta are attended to in all the inferior courts. No sooner is a decision published than it operates as a pattern and standard in all other tribunals and as a matter of course, all other decisions conform to it. If, in this court, a settled course of adjudication is overturned, then the trouble and confusion of reversing former causes succeeds in the inferior tribunals; and even the credit and respect due to this court is shaken by the phenomenon that A has lost his cause on the same ground that B gains his. And not only do these consequences follow, but some still more serious may ensue; for perhaps no court may strike the vitals of society with a deeper wound than a capricious departure in this court from one of its established adjudications." Under the rule which, for a quarter of a century, has been recognized, it has not been necessary in this state for a purchaser of such paper, which is fair on its face, to make inquiry as to its validity before buying it, and much business has been done on this basis. In other jurisdictions, where the opposite rule prevails, the practice has been different, and it would be manifestly a violation of the principle on which the doctrine of stare decisis rests, for this court, after the business of the state has adjusted itself to the rule which it has laid down, now to reverse itself, and lay down the opposite rule. Besides, the rule so declared seems in keeping with the spirit and purpose of our statute regulating paper of this character. Section 19 of the Civil Code of Practice, as follows: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any discount, set-off or defense now allowed; and if the assignment be not authorized by statute the assignor must be a party, as plaintiff or defendant. This section does not apply to bills of exchange, nor to promissory notes placed upon the footing of bills of exchange, nor to common orders or checks." It will thus be seen that bills of exchange, promissory notes placed upon the footing of bills of exchange, and common orders or checks are placed upon a peculiar footing. The reason for this is that a large part of the business of the commercial world is done through bills of exchange, bank checks, and notes placed upon the footing of bills of exchange, which pass from hand to hand in many transactions, serving as a substitute for money; and to promote this such paper in the hands of a bona fide purchaser is held free from defenses which might have been made between the original parties. By section 483, Kentucky Statutes, promissory notes, payable to any person or corporation, and payable and negotiable at any bank incorporated under the laws of this state, or organized in this state under the laws of the United States, which shall be indorsed to and discounted by the bank at which the same is payable, or by any of the other banks above specified, are thereby placed on the footing of foreign bills of exchange. The note in question was placed on the footing of a bill of

exchange. It was executed for the purpose of raising money. The purpose of the statute is to promote negotiations of paper of this character to facilitate commercial transactions and obviate the necessity of the use of currency. It is in keeping with the purpose of the statute that he who puts out paper which is to pass in this way in commercial transactions should exercise due care, for it is necessarily intended to be used in raising money; and the fair effect of the statute would be defeated if a defense such as that here made were allowed against the paper in the hands of a bona fide holder.

Judgment affirmed.

Chief Justice Guffy dissents.

Accord: Isnard v. Torres, 10 La. Ann. 103.

THE NATIONAL EXCHANGE BANK OF ALBANY, RESPONDENT, *v.* WILLIAM LESTER, APPELLANT

194 *N. Y.* 461, 87 *N. E.* 779, 21 *L. R. A. (N. S.)* 402n, 16 *Ann. Cas.* 770 (1909).

The defendant was sued as the accommodation indorser upon a note for $375 made by one Frank L. Fancher and acquired by the plaintiff bank before maturity in the regular course of its business.

The defense was that the note as originally made and indorsed was for $75 only; that the maker thereafter, without the knowledge or consent of the indorser, altered the note by inserting in the body thereof the words "Three Hundred" immediately in front of the words "Seventy-five," thereby making the instrument apparently a note for $375 instead of $75; and that the maker thereafter caused the note as thus altered to be discounted by the plaintiff bank. The answer prayed judgment that the complaint be dismissed except as to the amount of the note before alteration, together with interest and protest fees, to wit, $78.66. The defendant also served an offer to allow the plaintiff to take judgment for that amount.

Upon the trial the court charged the jury that if the note indorsed by the defendant was in fact a note for $375 on its face, the plaintiff was entitled to recover that amount and interest.

The trial judge further charged the jury that if they found that there were spaces upon the note "so carelessly and negligently left by this indorser, Mr. Lester, that a person having custody of the note might run in a figure 3 and the words 'Three Hundred' so not to occasion in the mind of the indorser (evidently meaning indorsee) any inquiry into its validity," they might find that the indorser conducted himself carelessly and negligently in the premises and thus invited the liability which the face of the note called for when presented to the bank.

The defendant duly excepted to that part of the charge to the effect that if the defendant was negligent in leaving blank spaces, the jury must find a verdict for the plaintiff for the full amount of the note as it stood. The court then reiterated the proposition, saying that "if the jury find that the defendant was careless and negligent in leaving vacant spaces for the words and figures, such carelessness and negligence on his part would still make him liable for the note;" and to this the defendant also excepted.

The jury found for the plaintiff in the sum of $375, with interest. The judgment entered upon the verdict has been unanimously affirmed by the appellate division.

Willard Bartlett, J.: As this case went to the jury, they might well have found that the note in suit was a note for only seventy-five dollars when originally prepared by the maker and indorsed at his instance by the defendant, and that it had subsequently been altered to a note for three hundred and seventy-five dollars when discounted by the plaintiff bank. They were instructed, in substance, however, that the indorser was liable for the amount of the note as raised by the alteration, if he had been careless and negligent in placing his name upon the instrument while there were spaces thereon which permitted the insertion of the words and figure whereby it was transmuted from a note for seventy-five dollars into a note for three hundred and seventy-five dollars. Conceding that the contract which he actually signed bound him only to pay the smaller amount, the jury were permitted to find that in consequence of his negligence in the respect indicated it had become a contract which bound him to pay the larger amount to a subsequent innocent holder of the paper. In support of the correctness of this ruling, the learned counsel for the respondent asserts the doctrine that "a party to a note who puts his name to it in any capacity of liability, when it contains blanks uncanceled facilitating an alteration raising the amount, is liable for the face of the note as raised to an innocent holder for value;" and he declares that this doctrine has been approved and apparently adopted in Alabama, California, Colorado, Illinois, Kansas, Kentucky, Louisiana, Michigan, Missouri, Nebraska and Pennsylvania.

In considering his proposition, it is important to bear in mind a radical distinction which exists between two classes of notes to which the adjudicated cases relate: (1) Those notes in which obvious blanks are left at the time when they are made or indorsed, of such a character as manifestly to indicate that the instruments are incomplete until such blanks shall be filled up; and (2) those notes which are apparently complete, and which can be regarded as containing blanks only because the written matter does not so fully occupy the entire paper as to preclude the insertion of additional words or figures or both. It is a note of the latter class that we have to deal with here. One who signs or indorses a note of the

first class has been held liable to bona fide holders thereof, in some of the cases cited by the respondent, according to the terms of the note after the blanks have been filled, on the doctrine of implied authority, while in other cases, relating to notes of the second class, the liability of the maker or indorser for the amount of the note as increased by filling up the unoccupied spaces therein, is placed upon the doctrine of negligence or estopped by negligence.

The cases cited by respondent in which parties to commercial paper executed by them while obvious blanks remained unfilled thereon have been held liable upon the instrument as completed by filling out such blanks, on the ground of implied authority, require no further consideration here, as there is no suggestion that there was any blank of this character upon the note in suit. These cases are Winter & Loeb v. Pool (104 Ala. 580); Statton v. Stone (61 Pac. 481, Colorado); Cason v. Grant Co. Deposit Bank (97 Ky. 487) and Weidman v. Symes (120 Mich. 657). There were obvious blanks also in the notes under consideration in Visher v. Webster (8 Cal. 109) and Lowden v. S. C. Nat. Bank (38 Kans. 533), and the decision in each of these cases appears to have proceeded upon the doctrine of implied authority rather than negligence.

It must frankly be conceded, however, that the respondent finds support for the doctrine which it asserts in the case at bar in the decisions of Pennsylvania, Illinois and Missouri, so far as the maker of commercial paper is concerned, and in those of Kentucky and Louisiana, in respect to the liability of a party who has indorsed or become surety upon a note in which there were spaces (not obvious blanks) that permitted fraudulent insertions enlarging the amount. (Garrard v. Haddan, 67 Pa. St. 82; Yocum v. Smith, 63 Ill. 321; Scotland Co. Nat. Bank v. O'Connel, 23 Mo. App. 165; Hackett v. First Nat. Bank of Louisville, 114 Ky. 193; Isnard v. Torres & Marquez, 10 La. Ann. 103.)

In Garrard v. Haddan (supra) a space was left between the words "one hundred" and the word "dollars" in which "fifty" had been inserted after the maker had signed and delivered it; and the court held the maker answerable to a bona fide holder for the full face of the note as altered on the ground of the negligence of the maker in leaving the space in the note which was thus filled up after execution. "We think this rule is necessary," said Chief Justice Thompson, "to facilitate the circulation of commercial paper and at the same time increase the care of drawers and acceptors of such paper, and also of bankers, brokers and others in taking it." It is a little difficult to see how the rule tends to make bona fide purchasers more careful, as this last observation suggests.

The case of Yocum v. Smith (supra) held the maker liable upon a note which had been raised after execution from one hundred dollars to one hundred and twenty dollars, the words "and twenty"

having been inserted in a space left between the word "hundred" and the word "dollars." The court said that the maker had acted with unpardonable negligence in signing the note and leaving a blank which could so easily be filled; that he had thus placed it in the power of another to do an injury and that he must, therefore, suffer the resulting loss. This decision undoubtedly sustains the position of the respondent, although there was another element of negligence in that case which is not present here. It appeared that the maker there was informed by letter by the purchaser, very soon after the date of the note, that he had bought it and of its date and amount; yet he made no objection as to the amount until nearly a year later.

In Scotland Co. Nat. Bank v. O'Connel (supra) the defendants executed and delivered a note for $100 to one Smith, the body of which was in his handwriting, in a condition which enabled him to add the words "thirty-five" after "one hundred" in the written part and put the figures "$135" at the head of the note in the space where the amount is usually indicated by figures. The St. Louis Court of Appeals held that the defendants were liable for $135 because they had delivered the note to Smith, who was their comaker, "in such a condition as to enable him to fill blank spaces without in any manner changing the appearance of the note as a genuine instrument."

The cases thus far discussed were all of them actions against the makers of the raised paper. The same rule, however, was applied against an indorser in Isnard v. Torres & Marquez (supra) by the Supreme Court of Louisiana under the following circumstances: Marquez indorsed a note for $150 for the accommodation of Torres. The amount was raised to $1,150 and purchased by the plaintiff in good faith as a note for that sum. The report states that there was testimony of experienced persons to the effect that if at the time of the indorsement the word "onze" (for eleven, the note being in French) and the additional figure before 150 were not there "the note would have exhibited blanks which at least with regard to the written part were unusual and calculated to attract attention and would have rendered the note unsalable in the market." In this opinion, upon inspection of the note, the court expressed its full concurrence. The indorser was held liable for the amount of the note as raised on the ground that he had not exercised proper caution. To the same effect is Hackett v. First Nat. Bank of Louisville (supra), where it was held that a surety who had signed a note in which were written the words "five hundred" with spaces before and after them, which the maker had filled up by writing "twenty" before and "fifty" after them, thereby making a note for $2,550, was liable thereon to a purchaser in good faith. In this case the attention of the Kentucky Court of Appeals was called to the fact that the great weight of authority was the other way, but in

view of the fact that the rule had been so established in Kentucky for a quarter of a century the court determined to adhere to it, in observance of the principle of staré decisis.

This court is not thus constrained. The question involved in the present appeal has not been authoritatively decided in this state and we are at liberty to adopt that view of the law which seems to us most consonant with sound reason and best supported by well-considered adjudications in other jurisdictions.

The outcome of these adjudications is accurately set forth, as it seems to me, by Mr. Randolph in his treatise on the law of commercial paper, as follows:

"Where negotiable paper has been executed with the amount blank, it is no defense against a bona fide holder for value for the maker to show that his authority has been exceeded in filling such blank, and a greater amount written than was intended. This was also once held to be the rule where no blank had been actually left, but the maker had negligently left a space either before or after the written amount which made it easier for a holder fraudulently to enlarge the sum first written. It has now, however, become in America an established rule that if the instrument was complete without blanks at the time of its delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention * * * will constitute a material alteration and operate to discharge the maker." (1 Randolph on Commercial Paper, p. 198.)

The rule thus stated is sustained by the decisions of the court of last resort in Massachusetts, Michigan, New Hampshire, Iowa, Maryland, Mississippi, Arkansas and South Dakota. In my judgment it rests on a sounder basis than the opposite doctrine and accords better with such adjudications of this court as bear more or less directly on the question involved.

The leading case sustaining this view is Greenfield Savings Bank v. Stowell (123 Mass. 196), in which the opinion was written by Chief Justice Gray, afterward an associate justice of the Supreme Court of the United States. The discussion is careful and exhaustive, reviewing all the important cases in England and America bearing upon the subject which had been decided up to that time (1877), including that of the Supreme Court of Pennsylvania in Garrard v. Haddan (supra), which was the principal authority the other way. I shall not undertake to review the same authorities here or paraphrase the opinion of Chief Justice Gray which deals with them in such a manner as fully to justify his rejection of the doctrine that the makers of a promissory note apparently complete when they sign it are liable for an amount to which it may subsequently be raised, without their knowledge or consent, on the ground that they were negligent in permitting spaces to remain thereon in which the figures and words which effected the in-

crease could be inserted. In support of his conclusion, however, he quotes some passages from the opinion of Christancy, J., in Holmes v. Trumper (22 Mich. 427), which will bear repetition as suggestive of some of the reasons why the forgery of a promissory note should not be held to create a contract, which the party sought to be charged never consciously made himself or authorized anybody else to make in his behalf. Speaking of the alleged negligence in leaving spaces on the note, Mr. Justice Christancy said: "The negligence, if such it can be called, is one of the same kind as might be claimed if any man, in signing a contract, were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest of the instrument. * * * Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery in whatever mode it may be accomplished; and unless, perhaps, when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered, as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it, and of the intermediate holders."

While a general reference to the cases cited and reviewed by Chief Justice Gray in Greenfield Savings Bank v. Stowell (supra) will suffice, there are some later decisions to which attention may be called. In Knoxville Nat. Bank v. Clark (51 Iowa 264) will be found a strong and well-reasoned opinion against holding a party to a note which has been fraudulently raised, after it left his hands, liable for negligence, because when he executed the instrument there were spaces left thereon (not being obvious blanks designed to be filled) which would permit of forgery. The trial court had rendered judgment against the maker for the amount of the note as raised from $10 to $110 on a finding of negligence in leaving a space before the word "ten" and the figures "10." "On this ground," said the Supreme Court of Iowa, "the court proceeded and the decision is based on the reasoning of the civil lawyers. But could it be anticipated that such negligence would cause another to commit a crime, and can it be said a person is negligent who does not anticipate and provide against the thousand ways through or by which crime is committed? It is not requiring of the ordinary business man more diligence than can be maintained on principle, or is practicable, if he is required to protect and guard his business transactions so that he can not be held liable for the criminal acts of another. If so, why should not the negligence of the owner of goods which are stolen excuse the bona fide pur-

chaser?" And referring to the argument that such a measure of liability is required to promote the free interchange of commercial paper (a view which seems to have been influential in the Pennsylvania case of Garrard v. Haddan) the court well said: "At the present day negotiable paper is not ordinarily freely received from unknown persons. Forgeries, however, are not confined to such. But the necessities of trade and commerce do not require the law to be so construed as to compel a person to perform a contract he never made and which it is proposed to fasten on him because some one has committed a forgery or other crime."

In Burrows v. Klunk (70 Md. 451) the Maryland Court of Appeals emphasizes the distinction between a note in blank as to the amount, when signed and delivered to another for use, and a note complete on its face when signed and delivered, in which has been written the sum payable, the date, the time of payment and name of the payee. "In such case," it is held "there can be no inference that the defendant authorized any one to increase the amount, simply because blank spaces were left in which there was room enough to insert a larger sum."

No one questions the proposition that where a party to commercial paper intrusts it to another with a blank thereon designed to be filled up with the amount such party is liable to a bona fide holder of the instrument for the amount filled in, though it be larger than was stipulated with the person to whom immediate delivery was made. (Van Duzer v. Howe, 21 N. Y. 531.) So, also, a note executed with a blank therein for a statement of the place of payment is not avoided in the hands of a bona fide holder for value by the insertion in the blank of a place different from that agreed upon by the original parties. (Redlich v. Doll, 54 N. Y. 234.) But where there is no blank for that purpose when the note is indorsed, the insertion of an obligation to pay interest is a material alteration which invalidates the instrument as against the indorser. (McGrath v. Clark, 56 N. Y. 34.) In the case last cited the note when indorsed ended with the word "at," followed by a space in which the maker, after indorsement, inserted a place of payment, adding the words "with interest;" but no suggestion appears to have been made that because the space left was large enough to allow the insertion of these words, the indorser was negligent and could be charged with the amount of the note, including the interest, on that ground. On the contrary, as the law then stood, he was relieved of all liability whatever as the effect of the unauthorized alteration. Now, however, under the Negotiable Instruments Law (O 205) he would be liable on the paper according to its original tenor.

To sustain the judgment in the case at bar in view of the instructions under which the issues were submitted to the jury, we must hold that the indorser of a promissory note, the amount of

which has been fraudulently raised after indorsement, by means of forgery, is liable upon the instrument in the hands of a bona fide holder, for the increased amount, because of negligence in indorsing the same when there were spaces thereon which rendered the forgery easy, though the note was complete in form. To do this would be to create a contract through the agency of negligence; for the action is not in tort for damages, but upon the contract as expressed in the note. But apart from any question as to the form in which the indorser is sought to be charged, I am of opinion that no liability on the part of the indorser for the amount of such a note as raised can be predicated simply upon the fact that such spaces existed thereon. This conclusion I base upon the authorities to that effect which I have already discussed and upon what seem to me to be considerations of sound reason independent of judicial authority. An averment of negligence necessarily imports the existence of a duty. What duty to subsequent holders of a promissory note is imposed by the law upon a person who is requested to indorse the paper for the accommodation of the maker and who complies with such request? It is a complete instrument in all respects—as to date, name of payee, time and place of payment and amount. There are, it is true, spaces on the face of the instrument in which it is possible to insert words and figures which will enlarge the amount and still leave the note apparently a genuine instrument—in other words, there is room for forgery. On what theory is the indorser negligent because he places his name on the paper without first seeing to it that these spaces are so occupied by cross lines or otherwise as to render forgery less feasible? It can only be on the theory that he is bound to assume that those to whom he delivers the paper or into whose hands it may come will be likely to commit a crime if it is comparatively easy to do so. I deny that there is any such presumption in the law. It would be a stigma and reflection upon the character of the mercantile community and constitute an intolerable reproach of which they might well complain as without justification in practical experience or the conduct of business. That there are miscreants who will forge commercial paper by raising the amount originally stated in the instrument is too true and is evidenced by the cases in the law reports to which we have had occasion to refer; but that such misconduct is the rule, or is so general as to justify the presumption that it is to be expected and that business men must govern themselves accordingly, has never yet been asserted in this state and I am not willing to sanction any such proposition either directly or by implication. On the contrary the presumption is that men will do right rather than wrong. (See Bradish v. Bliss, 35 Vt. 326.) As was said by Judge Cullen in Critten v. Chemical Nat. Bank (171 N. Y. 219, 224), it is not the law that the drawer of a check is bound so to prepare it that nobody else can successfully tamper

with it. Neither is it the law that the indorser of a promissory note complete on its face may be made liable for the consequences of a forgery thereof simply because there were spaces thereon which rendered the forgery easier than would otherwise have been the case.

I think the judgment of the appellate division should be reversed and a new trial granted, with costs to abide the event.

Cullen, Ch. J., Gray, Haight, Weener, Hiscock and Chase, JJ., concur.

Judgment reversed, etc.

"The material alteration of a promissory note by a stranger is a mere spoliation of the instrument, and the rights and liabilities of the parties thereto are not affected by such alteration." Daniels on Neg. Inst., 1373A (6th ed.).

(c) Alterations Beneficial to Promisor

SNODGRASS *v.* SHADER

113 *Ark.* 429, 168 *S. W.* 567 (1914).

This suit was brought by the appellee to recover of the sureties upon a bond of Pat W. Snodgrass, lessee, the rent for certain premises in Little Rock which he had failed to pay. Appellee was the owner of buildings Nos. 717 and 719 on Main street in the city of Little Rock, and on January 6, 1910, leased the first floors of these buildings as store rooms to Pat W. Snodgrass for a period of three years from January 1, 1910, for the monthly rental of $100, in advance, and on January 6, 1910, Pat W. Snodgrass, with L. K. Snodgrass and Wm. A. Snodgrass, as sureties, appellants herein, executed and delivered to appellee a bond to secure the payment of said rent conditioned as follows: "The conditions of the above bounden obligation are such that whereas Pat W. Snodgrass has entered into a written lease for the term of three years, beginning January 1, 1910, and ending January 1, 1913, for the lower floors or store rooms at 717 and 719 Main street, Little Rock, Ark., for the monthly rent of one hundred dollars per month, payable on the first day of each and every month in advance.

"Now, therefore, if the said Pat W. Snodgrass shall promptly pay the rent as set out herein, then this obligation to be null and void; otherwise to remain in full force and effect for any and all amounts up to the face of this bond for arrearages for rent. No obligation to become fixed as against this bond until there is default in payment of rent."

On November 1, 1910, the appellee, the lessor, and the lessee,

Pat W. Snodgrass, made another contract whereby the lessor paid to him the sum of $250 for which he released and surrendered to her store room No. 719, and he retained the other store room at a reduced rental of $50 per month. The lessor immediately rented the store room surrendered to her to another person for $75 per month. This release of the store room 719 to the lessor was not known of nor consented to by the sureties.

Thereafter the lessee defaulted in the payment of five months rent, the months of June, July, August, September and October, of 1912, at $50 per month, and suit was brought against him and his sureties therefor, and the sureties claim to have been discharged from liability because of the material alteration of the contract without their consent. Upon the trial judgment was recovered against them, to reverse which this appeal is prosecuted.

Kirby, J. (after stating the facts): The only question presented for consideration is whether appellants have been discharged from liability on the bond, executed by the lessee to the lessor for securing the payment of the rent, upon which they are sureties. It is conceded that before the end of the first year of the term of the lease, the lessee agreed with the lessor to, and did surrender, one of the store rooms and release it to the lessor for the consideration of $250 paid by her, and that she immediately thereafter leased said store room for $75 per month. This was done without the knowledge or consent of the sureties upon the bond. It was a material alteration of the terms of the contract without their consent, and released them from the further performance of it. They may have been perfectly willing to have been bound for the payment of $100 rent for the two store rooms, and had a right certainly to rely upon their principal paying his rent out of the entire property leased. If he had abandoned it, they could have taken his place and would have been in much better condition to save themselves a loss with both the store rooms. The one released was immediately thereafter rented for $75 per month, and the two store rooms might have been more easily rented together than separately. The courts have long held that any material alteration in the terms of the contract, whereby a surety is bound, discharges the surety if he has not consented to the change, and this is so even if the alteration be for the benefit of the surety; for, although the principals may change their contract to suit their pleasure or convenience, they can not bind the surety thereto without his consent, and, as the new contract abrogates the old, the surety is discharged from all liability unless he has consented to the alteration. O'Neal v. Kelley, 65 Ark. 550; Singer Manufacturing Company v. Boyette, 74 Ark. 601; 1 Brandt on Suretyship, p. 427; Hubbard v. Reilly, 98 N. E. 886; Warren v. Lyons, 9 L. R. A. 353; Stern v. Sawyer, 61 Atl. 36; Miller v. Stewart, 9 Wheaton 702; Penn. v. Collins, 5 Rob. (La.) 213. In Berman v. Shelby, 93 Ark. 479, the court said: "For a surety will

be discharged by any material and unauthorized alteration of his contract, and it is immaterial that the principal assured the obligee that the alteration would not affect the original contract, or that he failed to carry out the contract as altered."

Appellants were only sureties for the payment of the rent in accordance with the terms of their bond and the lease in case of the lessee's failure to pay, and the contract having been materially changed without their consent, they were thereby released from further liability. The judgment is reversed and the cause dismissed.

Accord: Driscoll v. Winters, 122 Cal. 65, 54 Pac. 387; Bethune v. Dozier, 10 Ga. 235; Weir Plow Co. v. Walmsley, 110 Ind. 242, 11 N. E. 232; Hubbard v. Reilly, 51 Ind. App. 19, 98 N. E. 886.

CAMBRIDGE SAVINGS BANK *v.* HENRY D. HYDE ET AL., EXECUTORS

131 *Mass.* 77, 41 *Am. Rep.* 193 (1881).

Morton, J.: This is a suit against the executors of one of the sureties upon a promissory note held by the plaintiff. By the note, which is dated October 16, 1871, the maker promises to pay to the plaintiff $6,000 on demand, with interest at the rate of seven and one-half per cent. per annum, payable semi-annually. At the trial, it appeared that the treasurer of the plaintiff, some years after the date of the note, having authority to do so, wrote upon the back of the note the memorandum, "Rate of interest to be 6½ per cent. from Oct. 10, 1876." The defendants asked the court to rule "that any change in the rate of interest of the note, whether made on the face of the note or by a memorandum in the margin or upon the back of the note, was a change in the terms of the contract, and a material alteration of the note such as would discharge the defendants' testator, if made without his consent, and that the indorsement upon the back of the note in suit was such an alteration;" which ruling the court refused.

The defendants contend, in the first place, that this memorandum thus made was a material alteration, in the sense of a mutilation of the note, which avoided it as to all parties not consenting to it. In the cases where it has been held that a material alteration of a note or other contract avoids it, there has been some change by erasure or interlineation in the paper writing constituting the evidence of the contract, so as to make it another and different instrument, and no longer evidence of the contract which the parties made. The ground of the decisions is that the identity of the contract is destroyed. Wade v. Withington, 1 Allen 561; Common-

wealth v. Emigrant Savings Bank, 98 Mass. 12; Belknap v. National Bank of North America, 100 Mass. 376; Hewins v. Cargill, 67 Maine 554. But in the case at bar it is clear that, using the word in this sense, there has been no alteration of the note. The original note remains intact. It is in no respect altered or made different. The memorandum on the back is evidence of an independent collateral agreement, and has no more effect than if it had been written on a separate paper. Stone v. White, 8 Gray 589.

The defendants also contend that, if the memorandum is to be treated as an independent collateral agreement, yet it makes such a change in the terms of the contract as to discharge the sureties, who did not consent to it. It is clear that, if a creditor makes any agreement with the principal debtor, or does any other act which is prejudicial to the rights of the surety, the surety is discharged from his liability. Thus, if the creditor, by a valid agreement founded upon a sufficient consideration, extends the time of payment of the debt, the surety is discharged. The reason is that such an agreement materially affects the rights of the surety, since it prevents him from paying the debt and having an immediate remedy against the principal debtor. Hunt v. Bridgham, 2 Pick. 581; Agricultural Bank v. Bishop, 6 Gray 317. Mr. Justice Story states the rule to be, "that if a creditor does any act injurious to the surety, or inconsistent with his rights; or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases the latter will be discharged." 1 Story Eq. Jur., p. 325. The surety is discharged because the act of the creditor is injurious to him and is inconsistent with the duty which the creditor owes to him. Where the act of which the surety complains is a new agreement changing some of the terms of the original agreement, we think the rule is that, if such new agreement is or may be injurious to the surety, or if it amounts to a substitution of the new agreement for the old, so as to discharge and put an end to the latter, the surety is discharged. But if the change in the original contract from its nature is beneficial to the surety, or if it is self-evident that it can not prejudice him, the surety is not discharged. Smith v. United States, 2 Wall. 219; Appleton v. Parker, 15 Gray 173; General Steam Navigation Co. v. Rolt, 6 C. B. (N. S.) 550; Bowmaker v. Moore, 7 Price 223; Holme v. Brunskill, 3 Q. B. D. 495.

In the case at bar, the new agreement was that, after a day named, the interest on the principal sum lent by the plaintiff should be at the rate of six and a half instead of seven and a half per cent. It was clearly not the intention of the parties to discharge the note and substitute a new contract in its place. The agreement presupposes that the note is to remain in force as a promise to pay the principal debt. The parties did not intend to release the principal debtor or the sureties from their obligation to pay the note, but only

to remit a portion of the interest payable under it for the use of the money. We know of no rule of law which requires us to defeat the intention of the parties by holding that this operated to discharge the original contract in whole. It is also clear that the change in the original contract, by reducing the rate of interest, could not be prejudicial to the sureties. It is to be borne in mind that there was no contract by the plaintiff giving time to the principal debtor, and no contract by the debtor that the amount of the note should remain on interest at the new rate for any time. The plaintiff could at any time have sued on the note and have had a right to sue their principal at once. The agreement was merely a stipulation to remit a part of the sum which the plaintiff might claim under the note. It did not tie the hands of the creditor, or alter unfavorably the condition of the surety. If there was any consideration for it, so that it had any validity, it could not operate to the injury of the sureties, any more than an indorsement of, or a receipt for, a part of the principal would. The change made in the terms of the note was necessarily beneficial to all parties bound by it. We are of opinion that the sureties were not discharged, even if they had no knowledge of the change; and that the ruling of the superior court to that effect was correct.

Judgment on the verdict for the plaintiff.

Accord: Ullmann Realty Co. v. Hollander, 123 N. Y. S. 772; Ganey v. Hohlman, 145 Ill. App. 467; Preston v. Huntington, 67 Mich. 139, 34 N. W. 279.

SECTION 2. CHANGE OF PARTIES

(a) Addition of New Party as Maker

CATTON *v.* SIMPSON

8 *Ad. & Ellis* 136 (1838).

Assumpsit for money paid, and on an amount stated. Plea, non assumpsit.

On the trial before Patteson, J., at the last York assizes, it appeared that in 1831 the defendant was indebted to a person named Allen, since deceased, in the sum of £120; and that the plaintiff gave Allen a promissory note for the amount. The note was in the words "we jointly and severally promise, etc.;" and to the plaintiff's signature, which followed defendant's, were added the words "as his surety." After Allen's death the defendant was called on by Allen's executors to pay the money. Time was allowed him, at his request, upon a person named Laybourne adding his signature as additional security; it did not appear that this was done in pur-

suance of any understanding which had existed at the time of making the note. Plaintiff and Laybourne, being afterward called on by the executors, paid cash one-half of the note. This action was brought to recover from the defendant the amount so paid by the plaintiff. The defendant's counsel contended that the addition of Laybourne's name vitiated the note.

The learned judge directed a verdict for the plaintiff and reserved leave to the defendant to move for a nonsuit.

LORD DENMAN, C. J.: In the absence of all authority, we shall hold that this was not an alteration of the note, but merely an addition which had no effect.

Littledale, Patteson and Coleridge, JJ., concurred.

Rule refused.

McCAUGHEY ET AL. *v.* SMITH ET AL.

27 *N. Y.* 39 (1863).

Appeal from the Supreme Court. Action upon a promissory note. The facts were as follows: When the note was presented to the referee, on the trial, it was in these words and figures, viz.:

"$200. Ninety days after date, for value received, I promise to pay to the order of Origen Smith two hundred dollars, at the office of W. C. Curry & Co., Erie, Pa. (Signed)

"Westfield, June 22, 1859." "W. H. HUNGERFORD,
"ALFRED HALL."

(Indorsed) "ORIGEN SMITH."

But when the note was indorsed by Smith, the name W. H. Hungerford was not signed to it; and the words, "Office of W. C. Curry & Co." were not in it. A blank was left for the insertion of the place of payment; and the referee found that Smith authorized Hall to fill it in the manner he did, with the words, "office of W. C. Curry & Co." Hall delivered the note to the plaintiffs in exchange for goods they sold and delivered to him and Hungerford at or about the day of its date. Afterward, and before the note became due, Hungerford, at the request of the plaintiffs, subscribed his name to the same, for the purpose of adding the security of his name with that of Hall to the plaintiffs, and without any other intent, and without the knowledge or consent of the defendant, Smith. Smith was the only party to the note who defended the action.

The referee decided that the plaintiffs were entitled to recover the amount of the note. After judgment in their favor, Smith appealed to the court at general term in the eighth district, where the judgment was reversed, and a new trial ordered, costs to abide the

event. The plaintiffs appealed to this court from the order granting a new trial. The case was submitted on printed briefs.

EMOTT, J.: The question of the manner or effect of the insertion of the place of payment is not before us. The referee has found, as a fact, that Smith indorsed the note, having no place of payment stated in it, and that it was to be filled up with the name of a bank in Erie, Pa., and it was so filled up with the name of a banking house at that place. There is no exception to this finding, and it disposes of the objection that the place of payment was inserted in the note without authority. So also the question of notice of non-payment of the note, if it was open to the defendant upon the present answer, is disposed of in the same way.

The main question in the case is the effect upon the indorser's liability of the addition of Hungerford's name to the note. It is certainly the result of the later authorities that the addition of another maker to a note made by one or more parties is a material alteration of the contract. Instead of being the several or the joint obligation of the original party or parties, it becomes the joint or joint and several undertaking of different contractors. It is not material whether the change be prejudicial or the contrary: it is sufficient that it is material. (Parsons on Bills and Notes, Vol. 2, p. 556; Gardner v. Walsh, 5 El. & B. 82.) In the case of Chappell v. Spencer (23 Barb. 584), the doctrine was applied in its strictest form, to vitiate a negotiable note whose holder had added his name as joint maker, instead of indorsing it, upon negotiating and obtaining the money upon it.

There is a difference between the present case and these, however, which must not be lost sight of. The referee finds in this case that the note was transferred to the plaintiff for goods sold, in its original condition, as the note of Hall, indorsed by Smith, and as declared upon in the complaint. Afterward Hungerford, at the request of the plaintiffs, for the purpose of adding the security of his name, subscribed his name to the note. This made no alteration of the terms of the contract, of course, as to the amount, or time or place of payment. It was not adding a joint maker, because the note had been made and negotiated. It was subscribing to become security upon a note already made and negotiated. Hungerford was not named in the original contract, and was not a party to it. He made a new contract with the holders of the note, as security for the maker, after the contract of the maker was completed. I do not see how he could become a maker of a note already made and delivered. If he could be held at all, I think, it must have been by treating him as a guarantor. If this were so, the case is out of the rule; for a guaranty of a note is not an alteration of it, or of the maker's contract on it. I therefore disagree with the conclusion of the Supreme Court on this point.

I am led to the conclusion that the order for a new trial should be reversed.

Denio, Ch. J., Davies, Wright and Selden, JJ., concurred, without passing upon the question as to the character of Hungerford's liability.

Balcom, J. (dissenting): The Supreme Court made the order, granting a new trial, on the ground that the defendant, Smith, was discharged, as indorser of the note, by reason of Hungerford subsequently signing the same as maker, without his knowledge or consent.

It is laid down in Chitty on Bills (Spring ed. 1854, p. 215), that, "after a promissory note has been made by one person, the name of another can not be added thereto as surety, unless by indorsement, because his becoming a joint maker would be making a new contract." The only authority cited to sustain this doctrine is the case of Clerk v. Blackstock, which was decided in 1816, and reported in 1 Holt N. P. Rep. 474. The note in that case was originally signed by Jackson, to whom the money, mentioned in it, was lent; and Clerk afterward required some new security from Jackson, in consequence of which Blackstock's name was added to it as a surety. Bayley, J., said: "I think this note may be considered as a joint and several note. The letter I applied to each severally. Lord Kenyon has ruled so. With respect to the other objection, if it were part of the bargain between Clerk and Jackson, that Blackstock should sign the note as principal, he might sign it at any time subsequent to Jackson's signature. But if it was no part of the original bargain, and Blackstock came in, upon an afterthought, as surety merely, the note will not be binding without an additional stamp."

In Byles on Bills of Exchange (published in 1829) the rule is stated as follows: "If a promissory note be signed by A and subsequently by B, as surety for A, whilst the note is in the hands of the payee, it will be void, unless the signature of B is in pursuance of a previous agreement, at the time of making the note." (Byles on Bills, Law Library, 4th series, Vol. 36, p. 247.) The case of Clerk v. Blackstock (supra) is cited by Byles, and also Ex parte White (2 Dear. and Chitt., 334), as authority for this rule.

The case of Catton v. Simpson (8 Adol. & Ellis, 136) was decided in 1838, wherein Lord Denman, Ch. J., held that a third person signing his name, as surety to a note, after it had been negotiated, without any understanding or arrangement with the makers, was not an alteration of the note, but merely an addition, which did not annul the original liability of the makers. But that case was overruled by the Court of Queen's Bench, in 1855, in the case of Gardner v. Walsh (32 Eng. L. & E. 162), wherein it was expressly adjudged that the maker of a note is discharged from all

liability to pay it, if the holder, without his knowledge or consent, procures another person to sign it as a joint maker. The court said: "We conceive that he (the original maker) is discharged from his liability if the altered instrument, supposing it to be genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice." The same rule was laid down by the Court of Appeals of Kentucky (Bank of Limestone v. Penrick, 5 Monroe 25), as early as 1827, and it was reiterated by that court in 1839, in Pulliam v. Withers (8 Dana 98). It was adopted by the Supreme Court of this state, in the seventh district, in 1857, in Chappell v. Spencer (23 Barb. 584), and sustained by a very able opinion delivered by Justice Smith.

The same doctrine is stated in Story on Promissory Notes (section 408a), in these words: "The rule is that the maker of a note is discharged by any subsequent alteration, wherever the altered instrument would operate differently from the original, whether the alteration be or be not to the maker's prejudice. Thus, where A signed a note as the sole surety for B, and afterward the payee procured C to sign, as additional surety, without A's knowledge or consent, this was held to discharge A from all liability to the note." Edwards, in his late Treatise on Bills and Promissory Notes, asserts the same doctrine. (Edw. on Bills, 681.)

The Supreme Court of Alabama held adversely to this rule, in 1846, in the case of The Montgomery Railroad Company v. Hurst (9 Ala. 513). But that case can not be followed. There is too much authority against the rule therein laid down to warrant its adoption in this state, whatever we might think of it as an original question.

It follows that this court must hold, that if the holder of a note, without the knowledge or consent of the maker, procures a third person to sign it as maker or surety, he thereby discharged the original maker from all liability thereon. And the rule is undisputed, that when the holder of a note discharged the maker from liability, without the knowledge or consent of the indorser, he thereby discharges the latter from all liability on the note.

The foregoing views show that the Supreme Court rightfully held in this case that the plaintiffs, by procuring Hungerford to sign the note, as additional surety, or maker, without the knowledge or consent of the defendant, Smith, who had indorsed it, discharged the latter from all liability thereon.

The order of the Supreme Court granting a new trial must, therefore, be affirmed, and final judgment rendered against the plaintiffs with costs.

Marvin and Rosekrans, JJ., also dissented.

Order reversed, and judgment at special term affirmed.

See also Brownell v. Winnie, 29 N. Y. 400, 86 Am. Dec. 314.

RICHARD CUDWELL GARDNER, JAMES SYKES, AND JOHN SYKES GARDNER *v.* WALSH

5 *El. & Bl.* 83 (1855).

Count: That defendant and one Elizabeth Barton and one Alice Clarke, by their promissory note now overdue, jointly and severally promised to pay to plaintiffs, or order, £500.

Plea, amongst others: "That the said promissory note, at the time when the same was first made and drawn, was intended by the defendant to be, and was made and drawn by, the said Elizabeth Barton and the defendant only; and that, after the same was so made and drawn by the said Elizabeth Barton and the defendant (being the said making thereof by the defendant in the declaration mentioned), and after the said note was completed, issued, and negotiated, that is to say, by the said Elizabeth Barton and the defendant, the plaintiffs, without the consent of the defendant, caused the same to be added to, altered, and changed in a material part thereof, and in a material point, that is to say, by causing the said Alice Clarke to sign the same and to become and be a joint maker thereof." Averment: that the alteration was not made in correction of any mistake originally made in the making or drawing of the note, "nor to further any intention of the said parties, or either of them, existing at the time when the note was first made by the defendant, or was first issued or negotiated." Issue thereon.

The other pleas led to issues which it is not necessary to notice.

On the trial, before Lord Campbell, C. J., at the sittings at Westminster after Michaelmas Term, 1854, plaintiffs proved the handwriting of the defendant to a joint and several note for £500, signed by Elizabeth Barton, the defendant, and Alice Clarke, and thus made a prima facie case. The defendant then gave evidence; and plaintiffs gave evidence in reply. On the whole of this evidence taken together it appeared that plaintiffs were merchants at Manchester, and had business transactions with Elizabeth Barton. They had arranged with her that they would give her further credit if she could get two sureties to sign with her a promissory note; and she had proposed to them the defendant and Alice Clarke. Elizabeth Barton proposed to defendant to sign the note as her surety; he agreed to do so, and accompanied her to Manchester, and there, in the office of plaintiffs, signed the note along with Barton. Afterward Clarke also signed the note. It was clearly shown that, at the time the defendant signed the note, Barton, the principal debtor, was a party to the arrangement that Clarke was to sign it as an additional surety; but it was left in doubt on the evidence whether the defendant was aware of this arrangement or not. The learned judge directed the jury that, if the signature of Clarke

was added without the previous assent of defendant, the plea was made out, as the addition of her signature materially altered the note. The jury found for the defendant on the issue on the plea, and for the plaintiffs on the other issues.

Lord Campbell, C. J., in this term (May 24th), delivered judgment.

In this case we are all of opinion that the rule can not be supported on the ground that the signing of the note by Mrs. Clarke did not amount to an alteration of the note and of the liability of the defendant in a material point. Supposing the other allegations of the plea to be proved, we think there is sufficient evidence that "the plaintiffs, without the consent of the defendant, caused the said note to be added to, altered, and changed in a material part thereof, and in a material point, that is to say by causing the said Alice Clarke to sign the same." If after the note was a perfect instrument, according to the intention of the parties, as the joint and several promissory note of the defendant and Elizabeth Barton, and after it had been "completed, issued, and negotiated," the plaintiffs, without the consent of the defendant, had caused it to be signed by Alice Clarke as a joint and several maker, along with the defendant and Elizabeth Barton, according to principle and authority he is discharged from his liability upon it. There would be no difficulty in showing that, under certain circumstances which might have supervened, this alteration might have been prejudicial to the defendant. But we conceive that he is discharged from his liability if the altered instrument, supposing it to be genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice. If a promissory note, payable at three months after date, were altered by the payee to six months, or if, being made for £100, he should alter it to £50, we conceive that he could not sue the maker upon it after the alteration, either in its altered or original form. The alleged maker was no party to a note at three months, or for £50; and the note at six months for £100, to which he was a party, is vitiated by the alteration.

This principle, which in Pigot's Case, 11 Rep. 26b, was established with respect to deeds, was applied to negotiable instruments in Master v. Miller, 4 T. R. 320 (affirmed on error in Exch. Ch., 2 H. Bl. 141); and (as far as we are aware) it has, with one exception, been uniformly acted upon down to the recent case of Burchfield v. Moore, 3 E. & B. 683 (E. C. L. R. Vol. 77).

The exception is Catton v. Simpson, 8 A. & E. 136 (E. C. L. R. Vol. 35). That case certainly does very nearly resemble the present. The defendant had, as surety, signed a joint and promissory note with the principal debtor, having no reason to suppose that any one else was to sign it. Afterward the payee, without the knowledge of the defendant, induced another person to sign it, with a view to strengthen the security; and the court held that the

defendant was still liable upon it. But the decision took place merely on refusing a rule to show cause why there should not be a new trial. It seems to have proceeded on the ground that, as the new surety could not be liable on the note by reason of the stamp laws, the alteration operated nothing, although the counsel urged that "a note with an altered date does not bind any one to the new contract, yet the old contract is void." The judgment of the court was, without further reasons, in these words: "In the absence of all authority, we shall hold that this was not an alteration of the note, but merely an addition which had no effect." With sincere respect for the learned judges who concurred in this decision, we feel bound to say that, in our opinion, it is contrary to the authorities, and that it is not law.

The counsel for the present plaintiffs ingeniously argued that the defendant, in signing the promissory note, had entered into two contracts, one separately, and another jointly with Elizabeth Barton; that, although they were both written on the same piece of paper, and expressed in the same sentence, they might be treated as if they had been written on separate pieces of paper respectively signed by the defendant; and that the separate contract on which the present action is brought is not at all affected by the signature of Alice Clarke, which made her a party to the joint contract entered into by the defendant along with Elizabeth Barton. But we must consider that a joint and several promissory note, although it contains two promises in the alternative, is one contract and one instrument, and that, if it is designedly altered in any part by the payee so as to alter the liability of the makers, it is entirely vitiated. According to Pigot's Case, 11 Rep. 26b, if the party to a deed makes an alteration in a covenant after the deed is executed, not only the covenant, but the whole deed, becomes void.

But, although we entertain no doubt upon this point, we do not come to the conclusion that the rule should be discharged. Looking to some of the allegations of the fifth plea, a difficulty arises with respect to the construction to be put upon them and the evidence necessary to support them. We therefore think the proper course will be to make the rule absolute for a new trial, the defendant being confined to one plea addressed to the alleged vitiation of the note by the signature of Alice Clarke, and having leave to amend that plea as he may be advised. The costs of the first trial, after deducting the costs of the issues found for the plaintiffs, to abide the event of the new trial.

Rule accordingly.

SHIPP'S ADMR. *v.* SUGGETT'S ADMR.

45 *Ky.* 5 (1848).

JUDGE SIMPSON delivered the opinion of the court.

This suit, by petition and summons, was brought on a note of $1,050, purporting to have been executed by William S. Sweatman, E. P. Suggett and Henry Sweatman, payable to Richard W. Shipp.

Shipp, the payee, and Suggett, one of the payors, having died, the suit was instituted by Shipp's administrator against the administrator of Suggett.

The defendant plead non est factum, and to sustain his plea, relied upon two grounds. First, that his intestate had not executed the note sued on. Secondly, if he had, that it had lost its obligatory effect as his act and deed, by having the name of Henry Sweatman added, as an additional obligor without his consent, after the note had been executed and delivered by William S. Sweatman and the defendant's intestate.

The first ground relied upon to sustain the plea, presented merely a question of fact for the determination of the jury. In support of the second ground, it was proved on the trial that the name of Henry Sweatman as an additional obligor was placed on the note subsequently to its execution by the other obligors, and at a different time and place, at the instance of Shipp, to whom the note was given. The evidence in relation to the assent of the first obligors to the procurement of the signature of Henry Sweatman as an additional obligor, was contradictory and inconclusive.

The court, at the instance of the counsel for the plaintiff, instructed the jury, "that if they found from the evidence, that the signature of E. P. Suggett to the note sued on was the act and deed of said Suggett, and that after he signed and delivered said note, Henry Sweatman, with his consent or approbation, signed the same as additional security, they must find for the plaintiff."

The counsel for the plaintiff also moved for the following instruction, which was refused, viz.: "That the note sued on being drawn joint and several, authorized the obligee to take the additional security of Henry Sweatman, unless E. P. Suggett dissented to it."

A verdict having been returned for the defendant, and a motion for a new trial overruled, a judgment was rendered in bar of the plaintiff's action, to reverse which this writ of error is prosecuted.

The only question presented of any importance grows out of the refusal of the court to give to the jury the foregoing instruction, as to the law of the case.

In the case of Bank of Limestone *v.* Penick (5 Monroe 25) it was held, that the addition of another obligor, and the insertion

of his name by the obligees in the body of the note without the assent of Penick, destroyed its obligatory effect as to him.

In the subsequent cases of Pulliam, etc., *v.* Withers (8 Dana 98) and Lilly v. Evans (3 B. Monroe 417), a new obligor had been added, without inserting the name in the body of the note; but in each case, the assent of the first obligors to the execution of the note by the last one, was considered as sufficiently established by the evidence, and the effect on the validity of the note as to the first obligors, which would be produced by the addition of another obligor, without their assent, express or implied, was left undecided.

It is contended on the one hand, that there is a manifest distinction between this case and that of the Bank of Limestone against Penick. In the latter, a change had been made in the body of the note by the insertion of the name of the additional obligor, by the obligees, which act, according to the established doctrines of the law, destroyed its obligatory effect as to the first obligor. In this case, on the contrary, the note being joint and several, the addition of another obligor did not change its original import, and the instrument is not really altered by the signature of an additional obligor. This difference between the cases is relied upon as sufficient to take this one out of the operation of the technical rule of the common law, which had been applied in the case of the Bank of Limestone against Penick, a rule which, in the language of the court in the case of Pulliam, etc., v. Withers (supra), is founded more on what is deemed good policy than substantial justice.

The argument on the other side is that there is no substantial difference between the cases; that every reason that can be given why the holder of a note should not have the right to obtain another obligor, and insert his name in the body of the note, applies with equal force to the present case. The addition of another obligor changes as effectually the note and its legal identity, as if his name were inserted in the body of the writing. By signing he becomes the joint obligor with those whose names are previously affixed. The number of the parties, the ratio of contribution, and the character and description of the instrument, are all substantially varied without the assent of the previous obligors. They may, by the altered condition of the instrument, be prejudicially subjected to a change of jurisdiction, in the event of any litigation arising in reference to the payment of the debt, or any other controverted matter in relation to it between the parties. The surety in the note who has obtained an indemnity may have it jeopardized by the loss of identity, produced by the change in the writing which evidences the debt for which he was liable, when the indemnity was obtained.

It is evident these consequences might ensue, if the payee of a note had the privilege of adding another obligor at pleasure, with-

out the assent of those who had previously executed it. It will impose very little hardship on the holder of a note or bond, to require him, before he procures a new obligor, to obtain the assent of the previous obligors. If the additional name tends to increase the security of the debt, and is procured for that purpose, and not with a view to prejudice the other obligors, or to obtain some undue advantage, their assent would hardly be withheld, and might be implied from very slight testimony, unless such an implication be forbidden by the form of the instrument, the nature of the transaction, or express evidence of dissent.

The effect of alteration in a material part, made by the party who holds the instrument, is to make void the writing thus altered. Now, although the addition of another obligor to a joint and several obligation, which had been executed by a plurality of persons, does not change the import of the instrument; yet it causes it to speak, in reference to the number of parties to it, a different language from that which it originally spake, and in this respect changes its legal effect and operation. The alteration, therefore, must be deemed material, and when made at the instance of the party himself who holds the instrument, without the assent, either express or implied, of the parties previously bound by it, renders the instrument, as to him, utterly void.

Inasmuch, therefore, as the instruction moved by the counsel for the plaintiff, imported a legal right on the part of the obligee to take the additional security of Henry Sweatman, without the assent, either express or implied, of E. P. Suggett, it was properly refused by the court below.

In support of the motion for a new trial, the plaintiff filed an affidavit, stating that a witness by whom he would prove the assent of Suggett to the execution of the note by Henry Sweatman, became intoxicated, and thereby stupefied to such an extent that his testimony to this fact was virtually lost to him on the trial; and that he was wholly unapprised of the situation of the witness until he was called and sworn.

This affidavit is insufficient to authorize a new trial, in opposition to the decision of the court below, for two reasons: First, the bill of exceptions shows that this witness was examined on the trial. His condition, therefore, was apparent to the court, and whether or not the plaintiff sustained any injury by his alleged intoxication, was a matter about which the circuit court that witnessed the whole affair, could judge much better than this court can from the plaintiff's affidavit alone.

Second, the correct practice in such a case is, for the party at once, upon the discovery of the cause, during the progress of the trial, which operates as a surprise on him, to move a continuance or postponement of the trial, and not attempt to avail himself of the chance of obtaining a verdict on the evidence he has been able

to introduce, and if he should fail, then to apply for a new trial, on the ground of surprise. To tolerate such a practice, would have the effect of giving to the party surprised an unreasonable and an unfair advantage, and tend to an unnecessary and improper consumption of the time of the court.

Wherefore, the judgment of the court below is affirmed.

Accord: Hall v. McHenry, 19 Iowa 521, 87 Am. Dec. 451; Wallace v. Jewell, 21 Ohio St. 163, 8 Am. Rep. 48; Hamilton v. Hooper, 46 Iowa 515, 26 Am. Rep. 161.

(b) Addition of New Party as Surety

ALBERT L. WARD *v.* SAMUEL HACKETT ET AL.

30 *Minn.* 150, 14 *N. W.* 578, 44 *Am. Rep.* 187 (1883).

MITCHELL, J.:[1] Defendant Elwis signed a negotiable promissory note as surety for defendant Hackett, and delivered it to Hackett, upon condition that he should not deliver it to plaintiff, the payee, until he procure the signature of one Johnson as co-surety. Hackett failed to get Johnson's signature, but, without the knowledge or consent of Elwis, got defendant Rice to sign it, and then deliver it to plaintiff, who took it in the ordinary course of business for a valuable consideration, without any notice of the facts hereinbefore stated and now set up by way of defense. Elwis now claims that he is not liable, first, because the note was delivered without Johnson's signature, contrary to the condition upon which he signed it and left it with Hackett; second, that the addition of the name of Rice to the note, without his knowledge or consent, amounted to a material alteration of the instrument, which discharged him. These two questions we will consider in the order named.

1. The form of the note, when Elwis signed it and gave it to Hackett, was such that it was apparently complete. There was nothing on the face of the paper indicating that any other cosurety was expected to become a party to the instrument, and no fact was brought to the knowledge of the plaintiff, before he accepted the note, calculated to put him on his guard, or which should have induced inquiry. Elwis by his acts clothed Hackett with apparent authority to launch the note as it then was. The surety having thus placed the instrument, perfect on its face, in the hands of the proper person to pass it to the payee, the law justly holds that, as against the payee who takes it in good faith, for value, without

[1] Statement of facts omitted.

any notice of this condition, the apparent authority with which the surety has clothed his principal shall be regarded as the real authority, and in such case the condition shall not avail the surety. This is too well settled to require discussion. Brandt on Suretyship, p. 354, and cases cited.

2. The second point is more important. It has been very fully and ably argued by appellant, but, unfortunately for us, the respondent has not deemed it necessary to discuss the question at any considerable length. The position of appellant is that the fact of Hackett's obtaining the name of another surety upon the note without his knowledge or consent, although done before the note was delivered to plaintiff, amounted to a material alteration of the instrument, which discharged him, even although plaintiff had no notice of the facts when he took the note. If this be the law, we are satisfied its announcement would be a surprise to the business and commercial world. It would render commercial paper a very uncertain and unsafe subject with which to deal. But we have carefully examined all of the numerous cases cited by appellant, and do not find one that goes far enough to sustain him. Many of these cases hold that a material alteration of a note made by one of the promisors before its delivery, without the knowledge of the other promisor, makes the note void as against such other promisor, although the payee have no notice of the alteration when he takes the note. Such is doubtless the law. But, upon examination, these will all be found to be cases whereby the body of the note or the contract itself was changed, as by alteration of the date, rate of interest, or amount of the note. And the reason given why, in such cases, the party is discharged, is the self-evident one that the contract is no longer the one he made. Numerous cases are also cited to the effect that the addition of a new party to a note, without the consent of the other parties, is a material alteration of the instrument. But these will be found to be cases where the new name was obtained after the note was fully issued and delivered to the payee, and at his instance or with his knowledge. We have been referred to no case, and have found none, going so far as to hold, where a surety signs a promissory note and intrusts it to his principal, and the principal, while the instrument is still inchoate and has not become effectual as a contract by delivery, procures an additional signer, that the cases cited might, at first sight, seem to favor such a doctrine, but, upon examination, will be found not to sustain it, even if the payee knew, when he took the note, the circumstances under which the additional signature was obtained.

The case of Haskell v. Champion, 30 Mo. 136, was one where, at the instance of the payee, the names of new principal obligors were substituted in place of the original one, by changing the in-

dividual signature of one partner into the firm signature, thus attempting to make a party surety for persons for whom he had never agreed to be responsible.

The case of Hall v. McHenry, 19 Iowa 521, contains dicta by some of the judges which go farther than any decision we have found. In that case the name of the additional surety was obtained before delivery of the note, but at the instance and for the benefit of the payee. After the note was delivered, the payee cut off the name of this additional surety without the knowledge or consent of the first surety. Wright, J., who delivered the opinion of the court, while admitting that he had found no authority to that effect, argues that thus adding a new surety, even before delivery of the note, would amount to a material alteration of the instrument, which would discharge the original surety, provided the payee knew, when he took the note, of the circumstances under which the additional name was added. He then states that the court was not agreed on this proposition, and then proceeds to decide the case upon another point, to wit, that cutting the additional name off the note was a material alteration, which discharged the original surety.

The rule that a material alteration of a contract avoids it had its origin largely in the necessity of preserving and protecting the integrity and sanctity of contracts. Properly applied, the rule is a salutary one. But the general sentiment of courts now is that the doctrine had been extended quite far enough, and that formerly especially in England, it had been carried too far, and applied to cases not within the mischief intended to be prevented. Therefore, the tendency now is, if not to restrict, at least not to extend it beyond what has been already decided. To hold that the obtaining of an additional surety to a note, under the facts of the case at bar, amounted to an alteration of the instrument that would discharge Elwis, would in our judgment be harsh, technical, and work injustice, and establish a doctrine contrary to the general understanding of business men, which ought to be the law of such cases, and is the only just basis of the implied contract resulting from the facts. In dealing with commercial paper, complete on its face, and signed by several parties, we apprehend it never occurs to a business man that it is incumbent upon him to inquire of each maker whether he understood when he signed the paper just what other parties were to sign with him, or whether any additional names have been subsequently added without his knowledge or consent. To require any such thing would be inconvenient, without reason, and an innovation upon business usages. The idea that when a person signs a note as surety, and delivers it to his principal, no other surety is to be obtained, and, if the note can not be negotiated in that form it can not be used at all, unless all parties

consent to the introduction of a new surety, is, we apprehend, contrary to the general understanding of the commercial world.

It seems to us that, at least as against an innocent holder, the principal obligor, to whom the paper has been intrusted by the surety, has implied authority to obtain additional sureties, until the note is launched into the market by delivery to the payee; and, as already remarked, this common understanding is the only just basis of an implied contract resulting from the facts. Courts have, in some cases, gone so far in holding that the addition of a new name to a note, under certain circumstances, amounted to a material and unauthorized alteration of the instrument, that it may be difficult to state the principle which distinguishes some of these cases from the present, nor do we feel compelled to attempt to do so. But whether or not the reason we have suggested be the correct one, we are satisfied that neither upon principle nor authority did the obtaining of Rice as additional surety amount, under the facts of this case, to an alteration of the instrument such as to release Elwis. As Rice's claim to be discharged is entirely predicated upon the assumption that Elwis was released, it is unnecessary to consider it further.

Order affirmed.

See also Graham v. Rush, 73 Iowa 451, 35 N. W. 518; Holthouse v. State, 49 Ind. 178.

MILES B. MILLER *v.* HUGH FINLEY, JR., ET AL.

26 *Mich.* 249, 12 *Am. Rep.* 306 (1872).

CAMPBELL, J.: Miller sued below upon a joint and several promissory note. Both defendants pleaded the general issue, and Hugh Finley, junior, appended to his plea an affidavit denying the execution of the note by himself. No notice of any kind was filed or served with the plea.

Upon the trial the defense was rested upon several grounds. It was claimed that Hugh Finley, senior, signed the note without the consent of Hugh Finley, junior, his son, who, it is alleged, refused to assent to having him sign, and after the note had been delivered as the sole note of the son. It was further claimed that when he signed it, he was in such a state of drunkenness, procured by the original payee, that he was not responsible for his acts. It was also set up that the note was one of several obtained by fraud, as the price of a worthless patent, for a horse-collar fastener.

Miller claimed as a bona fide holder. Judgment was rendered for defendants below, and he now brings error. * * *[1]

[1] Part of opinion as to sale of patent right as a consideration omitted.

It is also claimed by plaintiff in error, that the alteration in the note, whereby Hugh Finley, senior, became a party to it was not, as to the original signer, a material alteration. There is no doubt that any material alteration in a note, without the consent of the party responsible on it, and affected by it, will destroy it as to him. Wait v. Pomeroy, 20 Mich. R. 425; Holmes v. Trumper, 22 Mich. R. 427; People v. Brown, 2 Doug. R. 9. And there can be no question but that an addition to the number of signers of an instrument may in some cases, at least, affect the operation of it, as to some or all of those who have already signed.

The doctrine is settled in New York, that procuring the signature of a party, whose name was not originally on a note, is not necessarily material as to the first signers. In Muir v. Demaree, 12 Wend. 468, where holders, in order to get a note discounted, signed their own names as makers, in addition to the rest—the note being joint and several—and afterward paid it, they were held to have lost no rights, and to be authorized to sue it themselves, or transfer it to others. In McCaughey v. Smith, 27 N. Y. 39, where holders, without an indorser's knowledge or consent, procured a second name to a sole note, for the purpose of adding to their security, it was held not to be such an alteration as affected the indorser. A similar principle was recognized in Brownell v. Winnie, 29 N. Y. 400. There are some decisions bearing more or less on both sides, in other states. Only two English decisions bearing upon the question directly, have been cited. In Catton v. Simpson, 8 Ad. & El. 136, it was held that an additional party signing without a new stamp was not bound by his signature, and that the alteration, therefore, was not material. In that case the original note was signed by a principal and surety, jointly and severally, and the new name was procured by the principal for an extension of time. The original surety paid the note, and sued his principal for the money paid to his use. The principal defended, on the ground that the payment was voluntary, because the surety had been discharged by the alteration, and had no right to pay the note; but his defense was rejected.

In Gardner v. Walsh, 5 El. & Bl. 83, a principal and surety made a joint and several promissory note, and a second surety was added without the knowledge or consent of the first. A several action was brought against the first surety, who was held discharged by the alteration; and the court expressed an opinion that the former decision was not law.

In the recent case of Aldous v. Cornwell, L. R., 3 Q. B. 573; Catton v. Simpson is cited as an authority on the point that an alteration will not vitiate unless material; and the case of Gardner v. Walsh was referred to, merely to say, that it only overruled the former case on the question whether such an alteration as that passed upon was material. Aldous v. Cornwell is somewhat pointed

in condemning the early decisions which paid no attention to the materiality of alterations. And the doctrine that immaterial alterations should not be regarded is too well based on good sense to be overthrown.

The addition of a surety was not, in either of those cases, held to discharge a principal. It has always been competent for a person to become surety by signing the note of the principal, so as to become a joint and several maker. There is no rule which requires that a contract of suretyship must be contemporaneous with the principal obligation. And unless the principal's liability is in some way affected by the addition, it can not be material.

It is very difficult to see how such a change can affect him in any but a mere technicality, which neither changes, increases, nor diminishes his liability. Where there is no surety, the principal is liable to be sued severally, and made to pay the whole debt, if he has any property liable to execution. His liability on a joint judgment is precisely the same. His property is primarily liable, and if he has enough to pay the judgment, and it is paid by him, or out of his property, he has no further concern with the surety, as he can have no right of contribution for his own debt. The fact that he may not pay, does not in any way affect the nature or extent of his judgment obligation. A surety may, perhaps, in some cases, be injuriously affected by an addition to the number of sureties, where there is more than one already; as, in a case of the bankruptcy of any of them, his obligation to pay may be increased, and his right of contribution against cosureties diminished, by the change. But, as the principal is bound to pay the whole debt without contribution, his liability can not possibly be changed by the addition of sureties.

We think, therefore, that the original maker of the note could not complain of the procurement of his father's signature, and that he could not be discharged thereby. * * *[2]

The judgment must be reversed, with costs, and a new trial granted.

The other justices concurred.

Cf. Montgomery R. Co. v. Hurst, 9 Ala. 513; Mersman v. Werges, 112 U. S. 139, 28 L. ed. 641; Stone v. White, 8 Gray (Mass.) 589; Ex parte Yates, 2 DeG. & J. 191.

Contra: State v. Paxton, 65 Nebr. 110, 90 N. W. 983; Rhoades v. Leach, 93 Iowa 337, 61 N. W. 988, 57 Am. St. 281.

[2] Part of opinion with reference to defense of drunkenness omitted.

(c) Erasure of Name of Cosurety

CASS COUNTY *v.* AMERICAN EXCHANGE STATE BANK.

11 *N. Dak.* 238, 83 *N. W.* 12 (1902).

MORGAN, J.: In the year 1897 the county auditor of Cass county advertised for proposals for the deposit of county funds with the banks of the county, pursuant to the provisions of article 8 of chapter 26 of the Political Code of 1895. The American Exchange Bank of Buffalo, in said county, was thereafter designated by the county commissioners as one of the depositories of said county, and gave its bond as security for the payment to the county of the money so deposited, and to render a true account of such moneys as provided by said chapter. Such bond, delivered to and approved by the county commissioners of said county, was in the penal sum of $10,000. The American Exchange Bank of Buffalo failed to account for or pay over to said county the sum of $1,189.38. This action was commenced against all the sureties on said bond. The persons who signed said bond were S. E. Bayley, Neil McPhedran, John Moug, W. W. Merriell, W. L. Jones, C. A. Bullamore, Reuben Beard, P. T. Peterson, James A. Winslow, and P. Masterson, and they signed in the order named. The bond was circulated for signatures by one James A. Winslow, who was the president of the American Exchange Bank, the principal in the bond. The bond was executed by each of the sureties without any stipulations or conditions whatsoever, except such conditions as are necessarily implied by law. No one of the sureties entered into any express agreement or condition with said Winslow as to the persons who were to sign said bond, and there were no express conditions or agreements entered into between any of the sureties. While the bond was being circulated for signatures by the president of the bank, and after Bullamore had signed the bond, the name of Jones was erased from said bond by Winslow by drawing through the name of said W. L. Jones, as signed to the bond, and to his affidavit of justification, a red ink line. This erasure was made in the presence of and at the suggestion of one Stafford, who was then a member of the board of county commissioners. Such erasure was made without the knowledge or consent of the four sureties who had signed before Jones signed, and without the knowledge or consent of Bullamore, who had signed before such erasure, and neither of such sureties has since ratified the erasure of such name. The sureties signing after Bullamore did so without any knowledge of the fact that Jones' name had been erased after Bullamore had signed, but the fact that Jones had signed the bond and that his

name had been erased was apparent from a mere inspection of the bond when they signed it. Neither the name of Jones nor the names of any of the sureties had been inserted in the body of the bond at the time that the name of Jones was erased, and the names of such sureties were not inserted in the body of the bond until after all the sureties had signed it. The bond was then presented to the county commissioners for approval and approved. All of the sureties have been served with the summons in this action except the surety Winslow, and all have appeared except Bayley, Moug, and Winslow. The defendants Beard and Peterson in their answer deny that they ever signed the bond in question, or authorized any one to sign for them. The other defendants answered, alleging, in effect, that the bond upon which suit was brought was not their contract, nor binding upon them, by reason of the fact of the erasure of Jones' name from said bond without their knowledge or consent. The case was tried before a jury. At the close of the taking of evidence plaintiff's counsel moved the court for a directed verdict in favor of the plaintiff for the reason that the evidence shows, without contradiction, that they signed the bond in question, together with Moug and Bayley. This motion was denied. Thereupon special interrogatories were submitted to the jury, and the jury answered, in reference to the issues raised by the answers of Beard, Peterson, and Masterson. These answers were that Beard and Peterson signed such bond, and signed it after the name of Jones had been erased therefrom; that the names of the sureties were inserted in the body of the bond after all the sureties had signed it, and that Masterson signed the bond after all the other sureties had affixed their names to the bond. The plaintiff then moved the court for judgment, on the special verdict and undisputed facts, against the defendants McPhedran, Merriell, Masterson, Bullamore, Beard and Peterson. This motion was denied. The plaintiff then moved for judgment against all the defendants except Bullamore. This motion was also denied. The defendants then moved for judgment in favor of all the defendants interested in the trial and against the plaintiff, dismissing the action. This motion was granted. Judgment was accordingly entered, and the plaintiff has appealed from such judgment upon a settled statement of the case.

The assignments of error raised a single question only, viz., did the facts recited justify the lower court in ordering judgment of dismissal in favor of the defendants? The facts in the case are now mostly stipulated and are undisputed, and the issues raised by the answers are to be determined as questions of law solely. The bond in question was authorized by the provisions of section 1941, Rev. Codes. That section provides that the depository must furnish a bond, with not less than five freeholders as sureties, in double the amount to be deposited with such bank; and a pro-

vision is made for justification of sureties in arrest and bail proceedings as follows, so far as material; "they (sureties) must each be worth the amount specified in the order of arrest * * * but the judge or justice of the peace, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification is equivalent to that of two sufficient bail." The sureties on the bond in question did not justify by appearing before a court or judge to give evidence as to their property and qualifications as sureties, but each surety signed and was sworn to an affidavit stating his qualifications, and that he was worth a stated sum in property and not exempt by law from sale or execution, and over and above debts and liabilities. When "justification" is mentioned in considering this case, such affidavits are referred to, and not an appearance before a magistrate and giving testimony as to qualifications. The sureties on this bond, when finally approved, had justified by such affidavits in the aggregate sum of $24,000, without including Bullamore or Jones.

The question to be determined upon the facts stated is, are any of the sureties to be held responsible for the default of their principal? If so, which ones? The plaintiff contends that they are all liable except Jones. The defendants claim that all are exempt from liability by virtue of the erasure. Jones not being held, is Bullamore to be held liable, inasmuch as he signed before the erasure, and did not consent to such erasure of Jones' name, and had no knowledge thereof until this action was commenced? He signed, therefore, upon the condition that all who had signed before him would share equally with him in case of default in the conditions of the bond, and that he could hold such prior signers to contribution with him in case he paid or was compelled to pay anything on account of the default of the principal. On a former appeal of this same case, this court said: "The first man who signed the bond signed with the understanding that the principal would procure such additional sureties as might be necessary to make the bond comply with the requirements of the law. Each subsequent surety signed with the understanding and with the additional understanding that the particular persons whose names preceded his as sureties would be liable to him in contribution, should he be required to pay the bond. He signed relying upon their financial responsibility." 9 N. D. 267, 83 N. W. 12. See also Hessell v. Johnson (Mich.), 30 N. W. 209, 6 Am. St. 334. Before determining whether Bullamore was released, under the facts in evidence, it must be determined whether the acts of Winslow, as agent for Bullamore for the delivery of the bond to the commissioners for approval, was binding upon Bullamore, and the further fact whether the county commissioners had notice of the fact that Bullamore had signed before Jones' name was erased, or had notice of such facts as would necessarily put them upon inquiry. That Winslow was the

agent of Bullamore for the purpose of procuring such sureties as would make the bond comply with the law and secure its approval can not be doubted. His agency was limited to those acts. He was not vested with any discretionary or general powers, and could not bind Bullamore by any changes in the bond without his consent. He had no authority, under his special and implied agency, to substitute other signatures for those that were there when Bullamore signed. In doing so he exceeded his authority. Although Winslow did exceed his authority, that fact does not necessarily release Bullamore from liability on the bond. Bullamore trusted Winslow, and placed it in his power to impose upon him, and also to impose upon the commissioners. If no one else connected with the transaction had been guilty of a violation of duty, then Bullamore should be held responsible upon the bond. If the commissioners did everything required of them under the facts of which they had actual or constructive notice, then Bullamore, having trusted an agent that exceeded his authority, to his prejudice, should be the one that should suffer for his and his agent's delinquency. Brandt Sur., p. 60; King Co. v. Ferry (Wash.), 32 Pac. 538, 19 L. R. A. 500, 34 Am. St. 880. If the commissioners had knowledge of the conditions under which Bullamore signed the bond, and approved such bond with such knowledge, then they acted with notice of the fact that Winslow had exceeded his authority. In such case, Bullamore would not be liable, as the bond approved by the commissioners was not the same bond signed by him. If the commissioners had notice of facts sufficient to put them on inquiry as to the conditions or circumstances under which Jones' name was erased, and Bullamore signed, then they are presumed to have notice of all the facts which the carrying on of such inquiry would bring to their knowledge. It is admitted that Jones' name was erased by drawing a line through it with red ink, and that his signature to his affidavit of justification was erased in the same way. These erasures were plainly discernible by the most casual observation, and a most cursory examination of the bond could not have failed to have led to a discovery of the erasure. The duty devolved on the commissioners to make such examination, in the interests of the public, as well as in the interests of the sureties. Our conclusion is that the erasure of Jones' name, as it appeared on the bond, was such a fact as put them on inquiry as to the circumstances under which it was made. Such erasure was therefore notice to them that Bullamore signed the bond before Jones' name was erased, and without the consent or knowledge of Bullamore. Consequently it was notice to them that Bullamore was absolved from all liability by virtue of having signed the bond. No cases have been cited, and we have been unable to find any, precisely like the present one, upon the faces, so far as the question of implied notice is concerned. The cases are numerous holding that the erasure of the signature

and the erasure of the name in the body of the bond are sufficient as facts to put the obligee upon notice. Fairhaven v. Cowgill, 8 Wash. 686, 36 Pac. 1093; Smith v. United States, 2 Wall. 219, 17 L. ed. 788; Hagler v. State (Nebr.), 47 N. W. 692, 28 Am. St. 514. It was also held in many cases that the erasure of the name of an obligor in the body of the bond, who never signed the bond, is sufficient to put the approving authorities on inquiry concerning the facts of such erasure. Hessell v. Johnson (Mich.), 30 N. W. 209, 6 Am. St. 334; King Co. v. Ferry, supra; Dair v. United States, 16 Wall. 1, 21 L. ed. 491, and cases there cited. In McCramer v. Thompson, 21 Iowa 252—an action on a promissory note—the court held that the fact that the name of one of the signers was erased, and others had signed thereafter, was a fact sufficient to put the payee on inquiry as to the circumstances under which such erasure was made, and the subsequent signers were released. Our conclusion is that Bullamore can not be held, by reason of the alteration of the bond before delivery, to his prejudice, he not having assented to such alteration.

It now devolves upon us to determine whether the sureties Peterson, Beard, Winslow, and Masterson are entitled to be absolved from all liability by reason of the erasure of Jones' name, and the consequent nonliability of Bullamore. It will be remembered that these last-named sureties signed the bond after Jones' name had been erased therefrom. The erasure was made by Winslow, one of the sureties who signed it thereafter. The fact of the erasure of Jones' name was plainly to be seen by them, and they can not be heard to say that they did not know it. They claim not to be liable upon the hypothesis or contention that the four sureties who signed before Jones did are released, and that in consequence thereof the bond is not a statutory bond, with Bullamore and the four sureties first signing released. If such were our conclusion as to the four sureties first signing, we should, without doubt, hold that they never assumed any liability. But so far as the release of Bullamore is concerned, these subsequent signers can not claim that they are released in consequence of that fact. They signed with knowledge of the erasure of Jones' name, and were thereby put upon inquiry as to whether such erasure released Bullamore from liability. It will be presumed, therefore, that they signed knowing that Bullamore was actually released from all liability, and must be deemed to have consented to such release, and are now estopped to claim their release by virtue of such erasure or by virtue of the consequent release of Bullamore. Smith v. United States, infra.

We meet a different and more difficult question when we undertake to determine whether the four sureties first signing are to be held liable for the default of the principal in the bond. Each one of these four sureties, viz., Bayley, McPhedran, Moug, and Merriell, signed in the order given, without any express condition or

understanding or representation as to subsequent signers. The number of subsequent sureties was in no manner alluded to; nor was it understood or agreed or represented that any particular person or persons were to sign; nor was anything said or understood between Winslow and these sureties, or between these sureties among themselves, as to the financial character or responsibility of subsequent sureties, or the sum or sums for which they should, as between themselves, undertake to bind themselves when they signed the bond. We therefore undertake the determination of this question with the admitted fact that these four sureties signed this bond without any express condition or understanding or knowledge that Jones was to be a surety thereon. They, therefore, signed under implied conditions and legal presumptions only, and what were these? They had a right to infer that there would be five sureties thereon, because the statute provides that such bonds shall be signed by not less than five freeholders, and it also appears from the justifications that they assumed that enough sureties would be secured to bring the aggregate sums for which the sureties justified up to $20,000; that sum being double the penalty of the bond. The defendants contend that these four sureties "signed with the implied agreement that each person who should subsequently sign should be liable to him in contribution unless released with his consent." No authorities are cited which we deem to be fairly in point, and we are constrained to say that the facts of the case at bar do not, in our opinion, warrant the enunciation of that principle in the broad application contended for. In this case we must not lose sight of the fact that at the time of the release of Jones and Bullamore the bond was in process of preparation, and was in no sense a completed bond. No contract, express or implied, had then been entered into between all the sureties or between sureties and obligee. The bond was not then in condition to be approved. Winslow thereafter completed it by procuring four more sureties. The defendants strongly insist that these four sureties were released, or rather, never bound, upon the principle already stated. Such contention is based upon the following cases, which we will briefly refer to: In State v. Allen (Miss.), 10 So. 473, 30 Am. St. 563, the sureties signed the bond on the expressed condition that the bond should not be a completed bond until enough sureties had signed and justified in sums that would aggregate the penal sum of the bond. After a sufficient number had signed and justified in such sum in the aggregate, the name of one surety was erased without the consent of any of the other sureties who had signed. It was held that the erasure released all who had signed the bond after the surety whose name was erased had signed. The release of these sureties reduced the aggregate amount of the justification of the remaining sureties on the bond below the penal sum of the bond, in consequence of which their liability was increased beyond the amounts

contemplated by their express agreement when they signed the bond, and they were also held not bound. The case presents a condition of actual prejudice to the remaining sureties, and is based upon facts not at all parallel with the facts of the case at bar. State v. McGonigle (Mo. Sup.), 13 S. W. 758, 8 L. R. A. 738, 20 Am. St. 609, is a case based upon the following facts: A collector's bond was signed by the requisite number of sureties and presented for approval. While before the approving officer one of the sureties' names was erased, and another one procured. The erasure of this name released a surety who had subsequently signed. The person subsequently signing in the place of the surety whose name was erased had no knowledge that the person whose name had been erased had ever been a party to the instrument, and the court held him not liable upon the bond. It also holds that all prior signers were released, because the bond approved was not the obligation entered into by the parties. The court said in substance: "As presented for approval, it was a completed bond, and expressed the contract of the parties as entered into by them. They had agreed to be jointly and severally bound with those whose names appeared on the bond when presented for approval, but did not 'agree' that the name of Cain should be substituted for that of Dolling." The grounds upon which the decision is based seem to be that the alteration complained of was made after the contract or bond was a completed one. In State v. Churchill (Ark.), 3 S. W. 352, the facts are that the bond was altered by the erasure of a name after all the sureties had signed it and it had become a completed bond, and before approval. It is not an authority that the erasure of a name during the procuring of the bond, and before completion, releases those that had previously signed it. In Smith v. United States, 2 Wall. 219, 17 L. ed. 788, the defendant signed the bond at the same time or after the person whose name was erased without the knowledge or consent of the defendant. The court held the defendant not bound to respond in damages on account of the breach in the conditions of the bond. The rule, as stated in that case, is as follows: "Any variation in an agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, and which may prejudice him, or which may amount to the substitution of a new agreement for the one he subscribed, will discharge the surety." In State v. Craig (Iowa), 12 N. W. 301, the following are the facts: A bond was executed by eleven sureties for the faithful performance of the duties devolving upon Craig as warden of the penitentiary. One George G. Smith signed the bond as surety after seven sureties had signed it. After Smith signed, three others signed as sureties while Smith's name remained thereon. After all the sureties had signed the bond, and before it was offered for approval, the name of Smith was erased without the consent of any of the sureties. The court held the sureties

signing before and after Smith released. The court said: "But the bond had been put in circulation for the purpose of obtaining such number of signatures as Craig deemed necessary, to secure its approval. We may assume that the sureties in question signed with the understanding that that number would be obtained, and it could not have been understood that that number was to be obtained in such a way that a portion of them could not be held. * * * Their real contract was expressed by the bond as it stood when all the signatures had been obtained, and before the erasure." The court held that the bond was a completed bond, so far as the contract of the sureties was concerned, at the time of the erasure, and that it was prejudicial to the sureties who signed before Smith to erase the name of one surety, thereby releasing three other sureties that had signed after Smith. The facts of the case at bar are not at all parallel with that case. In this case the bond was not completed when the erasure was made. No contract had been entered into between the sureties. In the absence of express agreement, we know of no right that the first signers of a bond have to insist that a subsequent signer of the bond can not be released when such bond is, after such release, made to comply with the statute, and all implied conditions are complied with, without any possible prejudice to those first signing. In the Craig case can it be said that the decision would have been the same had the name of Smith been erased before the completion of the bond at the time and under the circumstances under which the name of Jones was erased in the case at bar? We think not. Without adopting the rule announced in the Craig case, but measuring for purposes of argument, the facts of the case at bar with the rule announced in that case, the sureties first signing would not be entitled to the judgment obtained by them in this case. At the time of the erasure, Winslow did not consider the bond satisfactory, as he then intended to procure two more sureties. If the sureties first signing in this case, as in the Craig case, assumed that a sufficient number of sureties would be procured to satisfy Winslow and render the bond approvable, the bond, as finally completed, complied with that assumption. Neither the Craig case nor any of the cases cited come within the facts of this case. In this case the relation of co-obligors had not come into effect between the persons who had signed before Jones did, either by express agreement or by implication of law. As to such signers there does not exist in the case a semblance of prejudice, either as a matter of fact or as a matter of law. The contention that these sureties are not bound under such a state of facts seems to us to be unwarranted as a matter of justice or principle, and can not be sustained by authority.

The judgment is reversed and the trial court is directed to order judgment against all the respondents except Bullamore. All concur.

SECTION 3. ALTERATION BY CHANGE IN OBLIGATIONS OF PRINCIPAL

(a) Contracts of Employment

R. JAMES MORRISON ET AL. *v.* CHARLES T. ARONS ET AL.

65 *Minn.* 321, 68 *N. W.* 33 (1896).

Action in the district court for Ramsey county. The case was tried before Kelly, J., who ordered judgment against defendant Arons for $801.43, and against defendants Williams and Hall for $559.50, with interest. From an order denying a motion for a new trial defendants Williams and Hall appealed. Reversed.

Collins, J.: Plaintiffs entered into business as copartners, and employed defendant Arons as general manager, salesman, and collector. According to the written contract, the employment was to continue as long as mutually agreeable. Arons was to receive as compensation for his services a sum equal to one-half the net profits of the business, and these profits were to be ascertained as follows:

"During the existence of the employment of said party of the second part, once each month, commencing with December 1, 1892, a just and true inventory of the assets and liabilities of said firm shall be taken, and all accounts which are considered bad shall be charged to profit and loss, and from the residue of the accounts due said firm shall be deducted five per cent. of the aggregate amount thereof as a reserve to cover bad debts, and the excess of the assets over the liabilities and the capital stock of said firm shall be determined and agreed upon as the net profits of said business, and a sum equal to one-half of such excess shall then and there be credited to said party of the second part as and for his compensation, and be considered an expense of said business. That when the relation between said firm and said party of the second part is extinguished, then the actual amount of profit or loss, as the case may be, of the business of said firm, shall be determined, and, if there has been a net profit, a sum equal to one-half thereof shall be allowed said party of the second part, and any errors in estimating the net profits at the previous stated periods shall then and there forthwith repay the same; and, if there is any amount due him on account of his compensation, it shall then and there forthwith be paid him."

Arons, as principal, and defendants Williams and Hall, as sureties, entered into a bond, in which plaintiffs were obligees, which, after reciting that Arons was about to enter plaintiffs' employ as

general manager, salesman, and collector, provided, and was conditioned, that:

"If the said Charles T. Arons shall faithfully and honestly perform all of the duties of his said employment, and shall keep just and true accounts of all moneys received and expended and all property bought and sold for or on account of said firm by him or under his direction, and shall faithfully and fully, and as often as required, account for and pay over to said firm any and all moneys belonging thereto collected or received by him, or which in any manner come into his hands in the course of his employment by said firm; and shall forthwith and on demand repay to said firm any and all moneys he shall have withdrawn therefrom for his own use in excess of the compensation due him for his services under the terms of this agreement with said firm in that behalf (whether such moneys shall have been so withdrawn with the consent of said firm or otherwise), as often as it shall be determined that such overdraft has been made, then the above obligation to be void; otherwise to remain in full force and virtue."

This action was brought to recover an amount of money said to be due on the bond, and the trial was by the court. No evidence was introduced tending to show any other settlement or accounting than that had when Arons' term of employment ended. In fact, plaintiffs admitted that they never ascertained, and could not, at the time of the trial, ascertain, what the respective monthly profits of the business had been. At the conclusion of the plaintiffs' case and again at the conclusion of the entire case, the defendant sureties moved the court to dismiss the same as to them upon the ground that, as it affirmatively appeared from the evidence and admissions that no monthly statements or accounting had been had as provided for in the contract of employment, the sureties upon the bond had been released from liability. These motions were denied, and the court made its findings of fact and conclusions of law ordering judgment in plaintiffs' favor.

The court found the allegation in the complaint that no settlement or accounting was had between the parties until after Arons' employment ceased, to be true. We agree with the court below in its construction of the contract, but we can not concur in its holding that the sureties were not discharged by the failure and omission to have monthly accountings and settlements between Arons and plaintiffs. The former was to have advanced to him $100 each month for personal expenses and on account of his compensation under an agreement that, if this amount, with other sums of money which came into his possession, exceeded one-half of the net profits of the business, the excess should be promptly refunded. What the profits were, and the sum due to plaintiffs, if anything, were to be provisionally ascertained each month; and, had this been done, it is quite certain that plaintiffs would have discovered be-

fore the expiration of thirteen months that the business was not profitable, while Arons would have learned that he was far from earning a living out of it. The natural result would have been for both parties to terminate their contract relation, and avoid further loss. It is evident that there would be much less hesitation on the part of a person called upon to become a surety upon a bond given for the faithful performance of a contract with such conditions than if the real situation was not to be ascertained for months. The condition in the employment contract whereby monthly accountings and settlements were agreed upon was an exceedingly beneficial one for all concerned. It was an essential feature of the contract whereby Arons agreed to conduct plaintiffs' business enterprise for an indefinite period of time, his compensation to be determined by the net profits. The contract of suretyship was departed from and varied when this provision was wholly disregarded, and the case is brought directly within the rule that, if an essential condition of such a contract is not complied with, a surety is not bound. A new trial must be had.

Order reversed.

See also Singer Mfg. Co. v. Boyette, 74 Ark. 600, 86 S. W. 673, 109 Am. St. 104; Fidelity Mutual Life Assn. v. Dewey, 83 Minn. 389, 86 N. W. 423, 54 L. R. A. 945.

A guaranty of a salesman's contract of employment in a certain territory is discharged by the enlargement of the district. Plunkett v. Davis Sewing Mach. Co., 84 Md. 529, 36 Atl. 115; Good Roads Mach. Co. v. Moore, 25 Ind. App. 479.

But see Fond du Lac Harrow Co. v. Bowles, 54 Wis. 425, 11 N. W. 795.

GERMANIA FIRE INSURANCE COMPANY *v.* HERMANN F. A. LANGE

193 *Mass.* 67, 78 *N. E.* 746 (1906).

Knowlton, C. J.: The defendant signed a bond as surety for the faithful performance of his duties by one Lichtenfels, as an agent of the plaintiff company for Worcester. If the bond is applicable to the conditions arising after the change hereinafter stated, there has been a breach of its conditions.

At the time of its execution Lichtenfels was employed by the plaintiff as its agent, at a fixed salary of $1,800 per year, the plaintiff paying the office expenses and brokers' commissions, amounting in the aggregate to about $2,100 per annum. Nearly nine years after the bond was given a new arrangement was made between the plaintiff and this agent, without the knowledge of the defendant, whereby the agent was to receive, instead of a fixed salary, a

stated commission on all business transacted by him in behalf of the company, and was to pay all the expenses of the business in Worcester, which included the rent, heating and lighting of the office, the advertising and the salaries of sub-agents. He also became responsible to the company for all premiums due on policies written by him or his sub-agents and not returned by him to the company for cancellation. In other particulars his duties were substantially the same as those he was performing while receiving a salary. If he did as much business under the new arrangement as under the old, it would yield him a greater compensation than his former salary. The defendant had no knowledge of this change in the arrangement until after the death of Lichtenfels. The only question in the case is whether this change in the contract between the plaintiff and the agent discharged the defendant from liability for the agent's subsequent defaults.

The bond contains no description of the contract between the plaintiff and Lichtenfels, beyond the statement that he had been appointed agent for this insurance company for Worcester. But in the condition of the bond many of his duties are mentioned, and the defendant also was told by the parties what the contract was. If he had not been expressly informed of this, he would have been presumed to have contracted in reference to the actual conditions, and to have known what they were, so far as they bore upon the liability assumed. It was therefore competent to prove by oral evidence the terms of the contract between the plaintiff and the agent, to show the nature and extent of the defendant's liability. Rollstone National Bank v. Carleton, 136 Mass. 226; Grocers' Bank v. Kingman, 16 Gray 473; Boston Hat Manufactory v. Messinger, 2 Pick. 223.

The general rule is familiar, that a substantial change in the conditions to which such a bond relates, made without the knowledge and consent of the surety, discharges him from further liability. Warren v. Lyons, 152 Mass. 310, 312; Grocers' Bank v. Kingman, 16 Gray 473; Northwestern Railway v. Whinray, 10 Exch. 77; Boston Hat Manufactory v. Messinger, 2 Pick. 223. In Warren v. Lyons Mr. Justice William Allen reviewed the authorities, and said in the opinion: "The question here is not merely whether the creditor has done some act which impairs the security or enhances the risk of the guarantor; but it relates to the subject-matter of the guaranty—whether the contract broken is the contract the performance of which is guaranteed. The guarantor cannot be held to a contract different from the terms of his guaranty, even though it be apparently more beneficial to him."

In the present case the question is whether there was a substantial change in the contract to which the bond relates. It seems to us very plain that there was. The case of Northwestern Railway

v. Whinray, 10 Exch. 77,* which has been cited and followed in this court, was very similar to this, and fully covers it.

The decision in Amicable Ins. Co. v. Sedgwick, 110 Mass. 163, was by only a majority of the court, and the change in the contract was much less than the change in the present case, as it pointed out in the opinion. That decision does not sustain the present plaintiff's contention.

Judgment for the defendant.

LIONBERGER, ASSIGNEE, *v.* KRIEGER ET AL., APPELLANTS

88 *Mo.* 160 (1885).

Black, J.: This is a suit upon the bond of the cashier of the banking corporation of which the plaintiff is the assignee, under the laws of this state relating to voluntary assignments. The bond is dated February 13, 1869, and is in the penal sum of twenty thousand dollars. It is conditioned as follows:

"Now, if the said J. Philip Krieger, Jr., shall well and truly and faithfully perform the duties of cashier of said bank for and during all the time he shall hold such office of cashier of said bank, and for and during all the time he may continue to act as such cashier of said bank, whether under the present appointment, or under future reappointments, and shall well, truly and faithfully account for, and render over to said bank all such money," etc., "and shall, while he continues in such service, either under the present appointment, or any future reappointments, faithfully and to the best of his ability, perform all trusts reposed in him, and all duties devolved on him by the law of the land, or by any by-law, rule, order or resolution of said board, now existing or hereafter made, enacted, or adopted, not inconsistent with the laws of the land, then," etc.

Krieger entered upon his duties and continued to act as cashier until and during the year 1878, under annual reappointments, made by resolution of the board of directors at the annual election of officers. In 1878, and while acting as such cashier, he made breach of the conditions of the bond to many times the amount of the penalty, the circumstances of which need not be stated.

The bank was organized in February, 1869, under the general laws of this state, with a capital stock of two hundred and fifty thousand dollars, which was increased in April of that year to three hundred thousand dollars; twenty per cent. of the stock, and no

*In Northwestern R. Co. v. Whinray the surety was discharged because the compensation of the principal was changed.

more, was paid in. The sureties contend that because of this increase during the first year they are released from all liability on the bond. A surety has an undoubted right to rely upon the letter and strict terms of the bond. "It is not sufficient that he may sustain no injury by a change in the contract, or that it may be even for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal." The rule thus stated in Miller v. Stewart, 9 Wheat. 702, has been again and again asserted here and elsewhere by one form of expression and another. But this does not mean that the fair import of the obligation is to be disregarded. Another rule equally binding upon the courts is that in the construction of the contract of a surety, as well as of every other contract, the question is: what was the intention of the parties as disclosed by the instrument read in the light of the surrounding circumstances? Brandt on Suretyship, § 80. In the application of these rules of law appellants place much reliance upon the case of Grocers' Bank v. Kingman et al., 16 Gray 476. There the stock was increased from $400,000, first to $500,000, and then to $750,000, because of which the sureties on the cashier's bond were held to be discharged. The court observed, "the risk of the sureties was thereby very greatly enhanced, especially as they undertook to save the bank harmless from every loss that might arise from the cashier's mistakes as well as losses arising from his fraud," etc. Because of the inability to answer for mistakes the court distinguished that case from Bank v. Wollaston, 3 Harr. 90. In that case the bond was made in 1833, and the stock was increased in 1837, by act of the legislature. The sureties of the cashier contended that they were thereby released. The court said: "The simple answer to the proposition is that there was no enlargement of the duties of the officer. The sphere of his duties was the same, although the subject-matter of his charge might be increased, which is no more than what happens from day to day, from fluctuation in the amount of deposits." In a recent case decided by the Supreme Judicial Court of Massachusetts (Railroad v. Loring, 19 Reporter 436), the bond was conditioned for the faithful performance of the duties of a ticket agent "which are, or may be, imposed upon him under this or any future appointment." The agent's salary was increased from one thousand to eighteen hundred dollars per year. The stock of the company was increased from $2,853,400 to $4,667,600. At first he sold tickets over one thousand and forty miles of railroad, and for three steamboat lines; the business was increased to twenty-two hundred and fifty miles of railroad and five steamboat lines. Notwithstanding these changes the sureties were held not to be discharged. The reasons assigned are that there was no change in the office, that the nature of the duties remained the same, and that the increase of business was fairly

contemplated by the bond, looking at the character of the position which the agent held. See also Ry. Co. v. Goodwin, 3 Wels. Hurl. and Gor. 320; Morris Canal, etc., v. Van Vorst's Admr., 21 N. J. L. 100; Strawbridge v. Ry., 14 Md. 360.

The stock, it is conceded, was increased in pursuance of § 2, ch. 62, General Statutes, and hence, by virtue of a vote of the directors made in compliance with a vote of the stockholders held in conformity with the by-laws. It is not contended that the sureties would have been released had the whole of the two hundred and fifty thousand dollars been called in, for that, it is conceded, would have been within the letter of the bond, so it might be urged that the stock could only be increased by some "by-law, rule, or resolution of the board," based, of course, upon a vote also of the stockholders. But we do not place our result on so narrow a ground. The bond must be understood and read in the light of the then existing law. It must have been in the contemplation of the parties that the bank would enlarge its business by all lawful ways and means, not going beyond a banking business. This it could do, if desired, by increasing its stock. The conditions of the bond are broad, and look to the future and to the making of additional by-laws and rules. That this increase of stock was fairly within the contemplation of the bond, we think, is clear, and the court might well have so declared in its instructions. * * *

We see no reason why the judgment in this case should be disturbed. It is affirmed. All concur.

Accord: Bank of Wilmington v. Wollaston, 3 Harr. 90.
Contra: Grocers' Bank v. Kingman, 16 Gray (Mass.) 473.

ANDREW H. KELLOGG *v.* FRANK M. SCOTT ET AL.

58 *N. J. Eq.* 344, 44 *Atl.* 190 (1899).

Emery, V. C.: Complainant files a bill to foreclose a mortgage given by Mrs. Fish upon her lands to secure whatever might become due to complainant under a bond given by defendant Frank M. Scott and Mrs. Fish, who was his mother, as his surety upon complainant taking Scott into his employment. The bond, a joint and several bond of principal and surety, dated November 19, 1892. in the penal sum of $7,000, contains the following recital and condition:

"Whereas, the above bounded Frank M. Scott is about to act as bookkeeper and collector for the above-named Andrew H. Kellogg, and by reason thereof will have the control of sums of money and be required to perform various acts. Now the condition of this obligation is that if the above bounden Frank M. Scott shall

well and truly account for and pay over and dispose of all moneys and property of the said Andrew H. Kellogg, which may come into his possession or under his control, and shall well and truly discharge and perform all his duties as such bookkeeper and collector, and if the said obligors or either of them shall pay over to the said Andrew H. Kellogg the sum and amount of any and all loss, damages, costs and expenses suffered or incurred by the said Andrew H. Kellogg, by reason of the failure of the said Frank M. Scott to pay over and account for all moneys and property, or his failure to discharge and perform all his duties as aforesaid, within ten days after notice is given to the said Rosanna E. Fish, of the sum and amount so to be paid, then this obligation to be void," etc.

Scott entered the employ of complainant on November 23, 1892, continuing until February, 1897. During that time Scott misappropriated his employer's moneys to the extent of about $6,300, and the bill is filed to foreclose the mortgage for this repayment. Mrs. Fish, subsequent to the execution of this mortgage, and in November, 1893, gave a mortgage to the defendant, the American Insurance Company, $1,000, for money loaned, and in August, 1895, gave another mortgage for $2,000 to the insurance company to take up the first mortgage of $1,000, which was then canceled, and to secure an additional loan. Fifteen hundred dollars is now due on this mortgage, with interest from February, 1897.

Mrs. Fish died in July, 1896, testate, having devised the lands in question to her son, Frank M. Scott, for life, with remainder to his children, the infant defendants, and giving a power of sale to the defendant executors.

The proofs showed that complainant was engaged in the job printing business in New York City, the volume of which amounted to from $80,000 to $130,000 a year during the time of Scott's employment. Previous to this employment Scott had been convicted of embezzlement from a previous employer, and after serving part of his term of imprisonment had been pardoned. The complainant knew this and the surety, Scott's mother, must also be presumed to have known it. From the time of this employment Scott was not only bookkeeper and collector, but also the cashier of complainant, and the only cashier, and as such had charge of all the cash received in the office, as well as charge of the books and pay rolls. He continued to be bookkeeper as well as cashier during his whole term of employment. He abstracted money under his control and, to the extent of $5,996, concealed the abstractions by means of false additions or footings in the cash-book from time to time, by which false footings the cash paid out appeared to be larger than was actually paid, to the extent of his embezzlement. Scott also had charge of making out the pay rolls for the employes and received the cash for their payment and paid the same. By

false footings and other false entries on the pay rolls, he drew out from time to time more money than he paid over to the employes, the deficiency from this source amounting to $312.66, as nearly as can now be ascertained on the present proofs.

Upon this state of facts, disclosed by complainant's evidence, it is insisted on behalf of the insurance company and the infant defendants, that the misappropriations of money were made by Scott in his employment as cashier and not as bookkeeper, and that the bond properly construed covers only such defalcations in Scott's capacity of bookkeeper. The general words of the condition provide that "Scott shall well and truly account for and pay over and dispose of all moneys and property of Kellogg, which may come into his possession, or under his control," and are not in terms confined to money received by him as bookkeeper; but it is claimed that, in reference to bonds of sureties for the faithful performance of the duties of an officer or employment, it is a settled general rule of construction that where the bond contains a recital of the character or scope of the employment, this recital will restrict the general words of the condition to the service specified, unless it expressly appears that it was not intended to be so restricted. The reason for thus limiting the general terms of the condition by the recital is said to be that the object of the bond being a security on employment, if the parties state in the bond the character or scope of the employment, that will be taken as indicating the limit of the surety's contract in the absence of any words which show that the parties intended that the recital shall not have this effect. And many cases have been cited in which, on the construction of the agreement itself, the recitals have been so construed to restrict the general words in the condition. The leading case is Arlington v. Merricke, 2 Saund., and the cases are collected in the note (h) (at p. 415, 3). Also in 1 Ch. Cont. (11th Am. ed.) 765; 1 Brandt S. & G., ch. 6, p. 166, etc., and National Banking Association v. Conkling, 90 N. Y. 116 (Earl, J., at p. 121.) But, in my judgment, the liability of the surety for a breach of the condition of the bond will still remain, even if it be held that the clause of the bond relating to the payment of money does not cover money under Scott's control as cashier.

The bond secures "the faithful performance of Scott's duty as bookkeeper," and this certainly includes the true entry and footing of the cash-book and pay rolls, which as bookkeeper he makes up, as well as the duty of not abstracting his employer's money which would come within his reach in the course of his employment as bookkeeper. For his failure to perform this duty of keeping true entries, the bond for securing his faithful services as bookkeeper is forfeited, and inasmuch as he himself took the moneys, whose abstraction was concealed by the false entries which he made

as bookkeeper, the employer, so far as the terms of the bond go, would, I am inclined to think, be entitled to recover substantial damages to the amount of the abstractions, either by the bookkeeper himself in any capacity, or by another, if the abstractions were intentionally concealed from the employer by means of the false entries made by the bookkeeper. Rochester City Bank v. Elwood, 21 N. Y. 88 (1860), and Jephson v. Howkins, 2 Man. & G. 336 (1841), seem to establish the right to recover such substantial damages as the result of false entries for the bookkeeper's own profit. But assuming that the loss in question may be held to be the result of the failure of Scott to perform his duties as bookkeeper, the most serious question raised, in reference to the liability of the surety in this bond, arises from the fact that Scott was employed as cashier after the giving of this bond, which recited only his employment as bookkeeper and collector. This employment as cashier, with control as such over all the money of the office as well as of the books—for he still continued as bookkeeper—was a material change by the act of the parties (Kellogg and Scott) without knowledge of the surety, in the nature of the duties of the employes and it was a change that materially altered the duties of the employment, so as to affect the peril of the surety. The employment which was in the mind of the surety upon giving the bond and which the obligee was about to make, was that of bookkeeper and collector. These descriptions of the character of employment do not of themselves indicate an employment which would give control of the entire cash of a business like complainant's, as well as of its books, nor is there any proof in the case that by the employment as bookkeeper and collector in complainant's business, the control of the cash of the business as cashier was supposed by the parties to be included. The general rule is settled, that in the case of bonds to secure the performance of the duties of an office or of an employment, where the nature of the employment is so altered, either by the act of the parties, employer and employé, or of the legislature (in case of public office), that the risk of the surety is materially altered, the bond is avoided, even though it is forfeited by a breach of the duties of the original office or of the original employment, which was the subject of the guaranty. This general rule has not been questioned since the leading cases. Bonar v. MacDonald, 3 H. L. Cas. 226 (1850); Pybus v. Gibb, 6 El. & B. 902 (1856), and these cases were approved and followed in this point in Manufacturers' Bank v. Dickerson, 12 Vr. 448, 451, etc. (Supreme Court, 1879).

The facts in this case come within the application of this rule. The bond, as I construe it, was given on the promise to the surety to employ Scott as bookkeeper and collector, and his employment subsequent to the execution of this bond, as cashier as well as bookkeeper, did make, as I find upon the facts in the case, a material

change in the nature of his employment, by which the risk of the surety was increased or varied to her disadvantage, and the bond must therefore be held void as against the surety and those who claim under her.

In this case the defense of discharge of the surety by alteration of the contract of employment was not specially set up in the answer of the insurance company or of the infants, the answers of the latter being formal only, and submitting their interests to the protection of the court. The question, however, was first presented by the complainant's own evidence at the trial, and was fully argued by counsel, and is, in my judgment, the vital question in the case. Counsel may, if they desire, apply to amend the answers in order to put the defense formally on the record. As to the infant defendants, the court usually allows or directs such amendments in either bills or answers filed on their behalf as may be necessary to protect their interests. Mitf. & T. Pl. & Pr. 419.

Accord: National Mechanics' Banking Assn. v. Conkling, 90 N. Y. 116, 42 Am. Rep. 405n.

(b) Public Officers

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANTS, *v.* ALDEN VILAS ET AL., RESPONDENTS.

36 *N. Y.* 459, 93 *Am. Dec.* 520 (1867).

This action was brought against the defendants who were sureties upon the official bond of M. P. Jackson, as loan commissioner of the county of St. Lawrence, for loaning the moneys of the United States deposited with the state. The bond was dated January 15, 1850. The questions of law that arose upon the trial at circuit were, whether a judgment of nonsuit, rendered in an action previously brought for the same cause, barred this action; and, second, whether the additional duties imposed upon the commissioners by the Act of April 10, 1850, discharged their sureties. It appeared in the present case that by the operation of that act, five hundred dollars was added to the capital of the fund in charge of the commissioners of St. Lawrence county, which, prior thereto, was upward of eighty thousand dollars. The cause was tried by the court without a jury, and upon the above grounds judgment was rendered for the defendants which, upon appeal to the general term of the fourth district, was affirmed upon the latter ground, from which the plaintiff appealed to this court.

GROVER, J.: The real question in this case is, whether the addition made to the capital of the fund placed in charge of the com-

missioners by the Act of April 10, 1850, discharged the sureties upon their official bonds. An examination of that act will show that it contains no provision effecting such a result, unless it is produced by this addition thereby made to the capital of the fund. This presents a question of vast importance to the public. It not only affects all the official bonds of all this class of commissioners holding office at the time of the passage of the act, but, on examination into the matter would, I think, show that it affected a great number of official bonds in other cases. This consideration can not change the law if settled in favor of the sureties, but the obvious inconvenience of a rule working such results requires a thorough examination of the reasons, and authority upon which it is claimed to be established. As between private parties, the law is that any alteration in the obligation or contract, in respect of which a person has become surety without the consent of the latter, extinguishes his obligation and discharges him (Burge on Surety, 214; Theobold, p. 132; Whirton v. Hall, 5 Barn. & Cress. 269); and this result follows, irrespective of the inquiry whether the alteration could work any injury to the surety or not (Bangs v. Strong, 4 Com. 315). The reason upon which this rule is founded is, that the surety has never made the contract upon which it is sought to charge him. His answer is, if it is sought to charge him upon the altered contract, that he never made any such bargain; and if upon the original contract, that such contract no longer exists, having been legally terminated by the altered or substituted contract made by the parties. In either contingency, the answer furnishes a complete defense. It is claimed by the defendants, that the same rule is applicable to official bonds. In this they are right, if the reasons apply and the same answers can be given. An official bond is a contract with the people for the faithful discharge of the official duties of the officer. In the present case it was that Jackson should faithfully discharge the duties of said commissioner pursuant to the act entitled an act authorizing a loan of certain moneys belonging to the United States, deposited with the state of New York for safe keeping, and should discharge his said duties without favor, malice or partiality. These duties Jackson has not performed, but the sureties claim to be discharged, on the ground that, subsequent to the making of the bond, five hundred dollars was added to the capital of the fund. The duties of the commissioner as to this five hundred dollars were precisely the same as required by the act referred to in the bond. The position of the defendants must go to the extent that any alteration made by the legislature in the act affecting the duties of the commissioner will discharge his sureties. In other words, that the bond is to be regarded as a contract faithfully to discharge the duties of the office as then prescribed by the act, and that any alteration in these duties made by the legislature subsequently, alters the contract, and hence

discharges the sureties. If this position be sound, it follows that no change can be made by the legislature relative to the amount of money in their hands, the mode of loaning it, their compensation or their duties in any respect, without discharging their official bond.

It may be remarked that it would not only relieve the sureties upon the bond but the officer himself, unless it should be held that his continuance in office after the passage of the act making the change was an assent on his part to such change. The analogy between this class of cases and the contracts of individuals fails in this respect. In the latter no alteration can be made without the mutual assent of both parties. In the former the legislature has power at any and all times to change the duties of officers, and the continued existence of this power is known to the officer and his sureties, and the officer accepts the office and the sureties execute the bond with this knowledge. It is, I think, the same in effect as though this power was recited in the bond. Had this been done it would not be claimed that the sureties were discharged by its exercises. That an individual given a guaranty of the faithful performance of a contract by one party containing a clause authorizing the other to make alterations in certain of its provisions, it would not be claimed that the surety was discharged by alterations so authorized; and yet this is nothing more than the sureties knew the legislature were competent to do in the present case. Why has it never been claimed in behalf of officers who had given bonds for the discharge of their official duties, that a contract had been made with them in relation thereto unchangeable by the legislature? Simply because it is understood that all these acts are subordinate to the lawmaking power, and necessarily subject to such changes as may from time to time be deemed expedient. Every official oath is so interpreted. It is not true that one taking an oath to discharge the duties of any office simply swears to discharge them as then prescribed by law; but that he swears to discharge them as they may from time to time be fixed and regulated by the lawmaking power. So an official bond conditioned for the discharge of the duties of the office should in like manner be understood, not as restricted to duties as then prescribed by law, but as embracing the duties of the office as from time to time fixed and regulated by the legislature. It may be said that, although such might be the general rule, yet that the bond in the present case contains a reference to the act, and requires the duties to be performed in accordance therewith. To this it may be answered, that section three of the act providing for giving the bond and its requisites requires no such reference, and that the bond in suit, in addition thereto, contains all required, that is, the true and faithful performance of its duties without favor, malice or partiality. The act does not prescribe the amount of money to be placed in, or which shall remain in the hands of

the commissioners. In the absence of authority determining the question otherwise, my conviction is, that any alteration, addition or diminution of the duties of a public officer made by the legislature, does not discharge his official bond or the sureties thereon so long as the duties required are the appropriate functions of the particular officer. That all such alterations are within the contemplation of the parties executing the bond. That imposing duties of another description, and not appropriate to the office, would discharge sureties not coming within such contemplation.

The question was regarded by the Supreme Court as settled in favor of the sureties by a series of decisions. If this be so, it is equally binding upon this, as upon any other court. No case holding any such doctrine has been decided by the courts of this state; neither the opinion of the learned justice, nor the brief of counsel contain any reference to any case in this state where the point has been involved, nor have I been able to find any such case. Bonar v. McDonald (1 Eng. Law and Equity) was a case between private parties, a bank and its agent, where the duties and responsibilities of the latter were increased by the bank, and has therefore no application to the present case. The same may be said of the Northwestern Railway Company v. Whitney, a contract between the company and its agent. In Oswald v. Mayor, etc. (26 Eng. Law and Equity), the question was, whether the bond embraced a new appointment to the office. Bartlett v. Attorney-General was the case of a new deputation, new security given for the additional duty. Pybus v. Gibbs (38 Eng. Law and Equity) is the only case where the question presented for judgment in the present case was directly involved. In that it was held that the sureties of a bailiff of a county court were discharged, on the ground that his powers had been enlarged and his responsibilities increased. The court do not appear to have considered the point, whether there was not a well grounded distinction between official bonds and contracts of private parties. There have been several cases in this country where it has been held, that a subsequent change of the duties of an officer do not discharge his sureties. In White v. Fox, 9 Shepley (Maine), it was held that a change in the duties of a clerk of the court did not discharge his sureties, the court saying that the sureties were bound for the faithful discharge of the duties of the office, that is, for the faithful discharge of such duties as the laws for the time being should require to be performed by the clerks of judicial courts; and further, that there was but little similarity between such cases, and those arising out of offices or trusts regulated by contract. (The People v. McHatton, 2 Gilm. 216). It was held that a legislative extension of the time for paying over the taxes of three weeks did not discharge the sureties of the officer. State v. Carleton (3 Gill. Md.) is a similar case. In Kindle v. State (7 Black. 586) a similar rule was applied where the time for pay-

ment by a county treasurer was extended. In Coulter v. Morgan's Administrator (12 B. Monroe 278) it was held, that the sureties were bound, although the taxes were increased after the giving of the bond. In Mooney v. State (13 Mo. 7) it was held that sureties of a sheriff were bound for the performance of new duties created after giving the bond. In Bartlett v. Governor (2 Bibb Ky.) a similar ruling was made. Other similar cases might be cited, but those already cited I think sufficient to show that a legislative alteration of the duties of an officer do not discharge the sureties so long as the duties remain appropriate to the office. My conclusion is that the judgment should be reversed, and a new trial ordered, with costs to abide the event.

Accord: Compher v. People, 12 Ill. 290; Dawson v. State, 38 Ohio St. 1; Commonwealth v. Holmes, 25 Gratt. 771; Marney v. State, 13 Mo. 7.

HERMAN DENIO ET AL. *v.* THE STATE USE OF WARREN COUNTY

60 *Miss.* 949 (1883).

In the fall of 1875 Herman Denio was elected to the office of clerk of the circuit court of Warren county, for the term of four years, commencing on the first Monday in January, 1876. Before entering upon the discharge of his duties he gave a bond, as prescribed by the general law. By an act, entitled "An act to make the county of Warren, in this state, a separate circuit and chancery court district, and to provide for defraying the expenses of the court therein," approved April 11, 1876 (Acts 1876, p. 237), and to take effect on the day of its approval, it was provided that each attorney and solicitor practicing before said courts should pay an annual license fee, and it was also provided, that upon each suit, petition, appeal, or other matter or proceeding of a civil nature brought in said court a docket fee should be paid. By this act the clerk was required to collect these various fees and to pay them over to the treasurer of the county, and it was provided that he should be responsible for the same on his official bond. This suit was brought on December 18, 1882, by the state, for the use of Warren county, against Denio and the sureties on his official bond, the declaration alleging that Denio had failed to collect and pay over $540 of such fees. Denio and the sureties interposed demurrers, but they were overruled, and from a final judgment rendered against them they appealed to this court.

Campbell, C. J., delivered the opinion of the court.

The act entitled "An act to make the county of Warren, in this state, a separate circuit and chancery court district, and to provide for defraying the expenses of the courts therein," approved April

11, 1876 (Acts 1876, p. 237), in its provisions for payment to the clerks of said courts of the license fees of attorneys and solicitors, and docket fees, added to these offices duties different in their nature from the duties of the offices at the time of the execution of the bond sued on, and these added duties were not embraced by the bond executed before the act was passed, although it declares that the clerks should be responsible for them on their bonds. The distinction is between an increase by the legislature of the duties of an office of the same nature or like kind as those before pertaining to it, after the execution of the bond, and the addition of new duties, not of the same nature or kind with those before belonging to it. Every official bond is executed with a knowledge of the right, and the practice of the legislature, to enlarge the duties of the officer, and for every additional duty imposed by competent authority, which is not in the kind, but in degree, merely different from those before pertaining to the office, and leaves the office unchanged in its functions, the bond before given may be fairly held to be a security, while for any duty, not pertinent in its nature to the office as existing when the bond was given, it can not be justly said to have been within the contemplation of the obligators that they should be bound for them, and they are not so bound.

Prior to the act referred to the circuit clerk was not charged by law with any duty of the nature or kind imposed by it. The act under consideration made a very important and material change in the nature of the duties of the clerk in its requirement that he should become a collector of the revenue for the defraying of the expenses of a separate circuit and chancery court district for the county of Warren, which was a material change of the scheme of maintaining courts, and conducting the offices of the clerks as before known and practiced in this state.

Judgment reversed, the demurrer of the sureties (appellants) sustained and the action dismissed as to them. Judgment affirmed as to Denio, and judgment for costs against him and sureties on the appeal bond.

Accord: White v. East Saginaw, 43 Mich. 567, 6 N. W. 86; Reynolds v. Hall, 2 Ill. 35; Spokane County v. Allen, 9 Wash. 229, 37 Pac. 428, 43 Am. St. 830.

BROWN *v.* LATTIMORE ET AL.

17 *Cal.* 93 (1860).

Cope, J., delivered the opinion of the court—Field, C. J., and Baldwin, J., concurring.

At the general election in 1857, defendant Lattimore was elected treasurer of Butte county and entered upon the discharge of his duties on the first Monday in October of that year. His term of

office was two years, but in 1859 the legislature extended the term to the first Monday in January, 1860. The only bond given by him was executed at the commencement of the term; and the question is, whether the sureties upon this bond are responsible for his official conduct during the time for which the term was extended. The bond, as originally executed, bound the sureties for the performance of his duties during the period for which he was elected, and until the election and qualification of his successor. His successor was to be elected at the general election in 1859, and by the law, as it then stood, was to qualify and enter upon the duties of the office on the first Monday in October following. The bond was executed with reference to these provisions; and we do not see upon what principle the legislature could impose additional responsibility upon the sureties. They stand upon the terms of their agreement, and the enlargement of these terms, even if contemplated by the legislature, was beyond the authority of that body. The provision of the bond in relation to the discharge of duties subsequently imposed has no application to a case of this nature. It only applies to such duties as may be required to be performed during the period of liability fixed by the bond, and can not be construed as authorizing an extension of that period. The effect of the bond must be determined by the law in force at the time of its execution; and there could be no subsequent legislation increasing the liability of the sureties, except as provided in the bond itself. The time for which the term was extended was no part of the time in which they had agreed to be liable; and by no action of the legislature could their liability be extended beyond that which they voluntarily assumed in executing the bond. They were to be bound, it is true, until the qualification of a successor, but if the legislature had not interposed, the period of liability would have been terminated, by such qualification, on the first Monday in October, 1859. So far as they are concerned, the effect of the extension was to create a new term, to commence at the time and continue until the first Monday in January, 1860. For the conduct of the treasurer during this term they did not undertake to be responsible, and can not, therefore, be held. The case of The People v. Aikenhead, 5 Cal. 106, is similar in principle, and sustains the conclusions at which we have arrived.

Judgment reversed and cause remanded.

Accord: King County v. Ferry, 5 Wash. 536, 32 Pac. 538, 19 L. R. A. 500, 34 Am. St. 880.

Duties imposed upon an officer, different in their nature from those which he was required to perform at the time his official bond was executed, do not render it void as an undertaking for the faithful performance of those which he at first assumed. It will still remain a binding obligation for what it was originally given to secure. Gaussen v. United States, 97 U. S. 584, 24 L. ed. 1009.

A diminution of the salary or fees of a public officer will not discharge the bond. Sacramento County v. Bird, 31 Cal. 66; Loving v. Auditor, 76 Va. 942.

(c) Building Contracts

O'NEAL *v.* KELLEY

65 *Ark.* 550, 47 *S. W.* 409 (1898).

The facts in this case are as follows: The plaintiff, Michael Kelley, on the 28th day of April, 1894, entered into a contract with defendant, C. A. O'Neal, by which O'Neal, for the sum of $2,000 to be paid by Kelley, agreed to furnish materials and erect for said Kelley a two-story brick house in the city of Texarkana. The contract required that the building should be constructed according to specifications named therein, and that it should be completed and turned over to Kelley free of all liens, on or before the 1st day of July, 1894. The defendants, C. C. Dorrian, H. Wolf, W. L. Snow and T. J. Wheeler, became sureties on the bond of O'Neal for the performance of such contract. O'Neal having failed to perform his contract, Kelley brought this action on his bond to recover the sum of $1,000 as damages suffered by him on account of such failure. The sureties set up that there had been a material alteration of the contract. On this point Kelley testified at the trial as follows: "The contract called for a building 96 feet long for lower story, and 75 feet long for upper story. After the Webber building had given away, I said to O'Neal: 'I wish the upper story of my building had been the same length as the lower story, because I was afraid we would have the same trouble they were having with the Webber building.' Mr. O'Neal said it would only take a little extra work, and would in no way affect the contract to make the change. I told him I did not want to do anything that would change the contract, and if it could be done so as not to change the contract, to figure it up, and say how much it would cost. He did so, and said it would cost me $25, and I gave him a check immediately. The only extra work was the ceiling, flooring and upper joists. The longitudinal walls were already there, and I estimated that $25 was a reasonable price for extra work, and therefore paid it." There was a judgment against the defendants for the sum of $500, from which they appealed.

RIDDICK, J. (after stating the facts): This is an action upon a bond given by O'Neal to Kelley for the performance of a building contract. The contract, for the full performance of which the bond was executed, required that, for the sum of $2,000 to be paid by Kelley, O'Neal should furnish materials and erect a brick building, the lower story of which should be 96 feet long and 14 feet high, and the upper story 75 feet long and 12 feet high. During the progress of the work, O'Neal contracted with Kelley that, for the additional sum of $25 paid him by Kelley, he would build the

upper story 96 feet long instead of 75 feet, as required by the original contract. The appellant sureties contend that this alteration of the contract discharged them from further liability on the bond, and we are of the opinion that this contention must be sustained.

"The contract by which a surety becomes bound," says the Supreme Court of Pennsylvania, "is voluntary on his part, without profit or advantage, and without having in view the prospect of gain. It is an act of benevolence to the obligor, and of convenience to the obligee; and of emphatic use to both. The obligations of social duty require, therefore, that he should be dealt with in fairness, and in a spirit of the utmost good faith. The obligor and the obligee are bound to know that if they find it convenient to change or vary the terms of the original contract, they must seek the assent of the surety, because it is his contract as well as theirs. And if they will not do so, they take upon themselves the hazard, and thus loosen the bonds of the surety." Hibbs v. Rue, 4 Pa. St. 348.

Any material alteration in the terms of such a contract discharges the surety if he has not consented to the change, and this is so even if the alteration be for the benefit of the surety; for, although the principals may change their contract to suit their pleasure or convenience, they can not thus bind the surety; and as the new contract abrogates the old, the surety is discharged from all liability unless he has consented to the alteration. Warden v. Ryan, 37 Mo. App. 466; Judah v. Zimmerman, 22 Ind. 388; Simonson v. Grant, 36 Minn. 439; Bethune v. Dozier, 10 Ga. 235; 24 Am. & Eng. Enc. Law, 837; 2 Brandt Suretyship, pp. 278, 288.

The alteration of the contract shown in this case was material, and there is nothing to show that the sureties consented thereto. It required that O'Neal should erect a building of dimensions different from that required by the original contract, and for which he was to receive a different consideration. It called for the erection of a more expensive building, but no extension was made in the time within which the building was to be completed. As the sureties had undertaken that O'Neal should complete the building within a limited time, an alteration of the contract, by which he was required to build a larger and more expensive building within the same time, was, in our opinion, not only material, but directly against the interest of the sureties; and, as the same was made without their consent, it clearly operated to discharge them.

The fact that Kelley refused to agree to the alteration until O'Neal, the contractor, had assured him that it would not affect the original contract is a matter of no moment, for O'Neal did not represent the sureties, and they are not bound by his opinion on a question of law. Nor does the fact that he afterward failed to carry out the contract as altered affect the question. It is the execution of the new contract, and not the performance thereof that discharges the surety.

There is no dispute about the facts of this case, and, after considering the same, we are of the opinion that the judgment of the circuit court against the sureties of O'Neal is not supported by the evidence. The judgment as to them is reversed, and the case is dismissed; but as to O'Neal it is affirmed.

See also Fransioli v. Thompson, 55 Wash. 259, 104 Pac. 278; Reissaus v. Whites, 128 Mo. App. 135, 106 S. W. 603; Alcatraz Mason Hall Assn. v. United States Fidelity &c. Co., 3 Cal. App. 338, 85 Pac. 156; Woodruff v. Schultz, 155 Mich. 11, 118 N. W. 579, 16 Ann. Cas. 346.

JONATHAN WARDEN ET AL., RESPONDENTS, *v.* MICHAEL RYAN, APPELLANT

37 *Mo. App.* 466 (1889).

Rombauer, P. J., delivered the opinion of the court.

The liability of a surety depends on the identity of the contract and its strictissimi juris. If the contract between the principals be altered without his consent, so as to destroy its identity, he is discharged, and it is immaterial whether the alteration be for his benefit or not, because he has a right to stand upon the very terms of his agreement This proposition is so firmly imbedded in the law of principal and surety that no considerations of apparent equity are permitted to disturb it, however great the hardships may be which, in individual cases, appeal for a modification of the rule. The unquestioned law, thus stated, we are called upon to apply to the undisputed facts of this case.

The plaintiffs entered into a written contract with Francisco and Sanguinet for the erection by the latter of a building at an agreed sum of fifty-five hundred and sixty dollars to be paid in certain instalments. The defendant became the surety of the builders, and bound himself to the faithful performance of the contract by them, and to their delivery of the building, discharged from all claims, liens and charges, within a specified time. The building was not delivered within that time, nor was it delivered free from lien claims. The plaintiffs were compelled to pay, and did pay, these claims, and thereupon brought the present action against the defendant surety, who interposed the defense that the original contract had been altered so as to increase the consideration to be paid by the plaintiffs to his principals for the erection of the buildings; that thereby a new contract was substituted for the one, for the performance of which he had become surety; all of which was done without his consent.

It appeared from the plaintiffs' evidence that, within two days after the contract was signed, Sanguinet, one of the contractors,

accompanied by the plaintiffs' architect, called upon the plaintiffs and stated that a clerical error had been made in footing up accounts, and that they could not complete the building unless the error, amounting to six hundred and fifty-nine dollars and fifty cents, was rectified. The plaintiffs then agreed to pay the contractors the additional amount of six hundred and fifty-nine dollars and fifty cents, making the contract price six thousand two hundred and nineteen dollars. That this was the transaction, admits of no doubt. In answer to the question, what did you agree to pay them, one of the plaintiffs says: "What the amount would be when the contract was footed up correctly, six thousand two hundred and nineteen dollars." The other plaintiff says: "They said they could not erect the building for that, and that they had made a mistake in footing up their account; so we told them to go ahead, and put that building up and we would give them six hundred dollars in addition."

The architect took the written contracts which had been executed in duplicate, and changed them by inserting sixty-two hundred and nineteen dollars and fifty cents as the consideration to be paid, and by striking out fifty-five hundred and sixty dollars, and by making corresponding changes in the instalments. This he did without express authority from plaintiffs and without their knowledge. The payments of the various instalments were subsequently made by the plaintiffs in conformity with the figures inserted by the architect. There was no evidence that the defendant knew of this new agreement or assented thereto.

All these facts, appearing in the plaintiffs' evidence, the defendant, at the close of plaintiffs' case, requested the court to instruct the jury that the plaintiffs could not recover, which instruction the court refused.

The learned counsel for plaintiffs, aware of the danger of the situation, labors exhaustively to show that the alteration of the written contract by the architect was unauthorized, and that the liability of the parties, as dependent on that instrument, was not changed, notwithstanding such alteration or spoliation. But that argument loses sight of the real question at issue, whether the work by the contractors was done under the contract stated in that instrument, or under a contract subsequently made of which the written instrument formed only part? There was nothing to prevent the principals from making a new contract for themselves, although they could make none for the defendant without his consent, and if the legal result of the plaintiffs' act is equivalent to the making of a new contract, the mere fact that they had no such intention is immaterial; nor could it be said that the new contract was not supported by a consideration, because it was supported by the consideration of sixty-two hundred and nineteen dollars and fifty cents to be paid on one side, and of the building of the house for that

sum on the other. That the contract thus made is not identical with the contract on which the defendant became surety, is evident, and the surety's liability depends on the identity of the contract.

An attempt was made by plaintiffs' counsel to show that this additional six hundred and fifty-nine dollars and fifty cents was a mere gratuity or bonus, and an instruction was asked on that theory. There is nothing in the evidence to support that view, or to authorize the jury to draw that inference legitimately from anything in the plaintiffs' evidence. Whether it was a gratuity depends not on the fact how the plaintiffs viewed it in their own minds, but whether, under the uncontroverted facts, they were under a legal obligation to pay it, after they agreed to pay it. The contractors insisted on an agreement for the payment of this additional amount, owing to a mistake in the original bid, and as a condition precedent to their entering upon the performance of the contract on their part. It was optional with the plaintiffs to accede to this demand, or else hold the contractors to their original agreement, but when they acceded to the demand and agreed to pay a new consideration, they necessarily entered into a new contract. The architect by inserting this new consideration into the contract only expressed the true intention of the parties, even though the act of insertion was unauthorized. It might with equal propriety be said that if, upon a similar demand made by plaintiffs, the consideration would have been reduced instead of being increased, it would have been a gift from the contractors to the plaintiffs in no way affecting the liability to the surety.

These considerations necessarily lead to the conclusion, that the court erred in not instructing the jury, at the close of the plaintiffs' evidence, that, upon the case made, the plaintiffs could not recover; and further erred in submitting to the jury the question whether the additional consideration agreed to be paid by plaintiffs was a mere gratuity. We find no errors in other parts of the record, but for these errors we are bound to reverse the judgment, notwithstanding the seeming hardship of the case.

Judgment reversed and cause remanded. All the judges concur.

Where the alterations are trivial and do not prejudice the surety he will not be discharged. Ganey v. Hohlman, 145 Ill. App. 467; Stephens v. Elver, 101 Wis. 392, 77 N. W. 737; Segari v. Mazzei, 116 La. 1026, 41 So. 245; Prescott Nat. Bank v. Head, 11 Ariz. 213, 90 Pac. 328; 21 Ann. Cas. 990; Boppart v. Illinois Surety Co., 140 Mo. App. 675, 126 S. W. 768; Hohn v. Shideler, 164 Ind. 242, 72 N. E. 575.

BARTLETT & KLING, APPELLEES, *v.* THE ILLINOIS SURETY COMPANY, APPELLANT

142 *Iowa* 538, 119 *N. W.* 729 (1909).

Action at law upon a bond given by defendant to secure the performance of a contract made by one Glattfeld with plaintiff for the construction of certain brick and stone work about and upon what was known as the "Central Heating Station" for the State Agricultural College at Ames. Plaintiff claimed something like $3,000 as owing it because of the defaults and delinquencies of Glattfeld, and in a supplemental petition asked for work done after the bringing of the suit. Defendant set up a counterclaim for extra work done by Glattfeld, and averred that the original contract, plans and specifications had been orally changed without its consent and contrary to the terms of the original contract, thereby releasing it from liability. It also pleaded a release, due to the fact that plaintiff had not sued the principal, Glattfeld, within six months from the completion of the work, as it had agreed to do. The case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.

Affirmed.

DEEMER, J.: Plaintiffs are general contractors, and as such they undertook the erection and construction of what was to be known as the "Central Heating Station" for the State Agricultural College at Ames. They sublet the "brickwork, masonry and bricklaying" to one Glattfeld, the contract with him having been executed June 26, 1906. On July 20, 1906, the bond in suit was signed by Glattfeld as principal and the defendant as surety. It is for the penal sum of $3,000, and is conditioned as follows:

The condition of this obligation is such that, whereas the said principal has entered into two certain written contracts with said Bartlett & Kling, for the doing by said principal of taking down and reconstructing and completion of the brickwork and the setting of the partitions of construction of Macon County Infirmary, Macon, Mo., under date of June 6, 1906, and brickwork, masonry and bricklaying, including setting of stone trimmings for construction of Central Heating Station Building, city of Ames, Iowa, under date of June 25, 1906, now, if the said principal shall well and truly keep, do, fulfil, and perform each and all of the covenants, obligations, undertakings, conditions and guarantees of said contracts by said principal to be kept, fulfilled or performed and at cost to said Bartlett and Kling as in said contract provided for, then this obligation to be void, otherwise to remain in full force and virtue.

The contract with reference to the work at Ames is very long

and need not be set out in full. We shall refer to the material parts by setting out the substance thereof or by excerpts taken from the record. Glattfeld was named as the first party, and Bartlett & Kling the second, and it was promised, among other things, that:

Article 1. First party agrees to furnish all labor and material, and do and perform all the work required, for the full doing and completion of the brickwork, masonry, and bricklaying, including setting of stone trimmings, for construction of Central Heating Station building in the city of Ames, Iowa, all in full and strict accordance with the present plans and specifications, and their requirements, including all work and material of character and kind above mentioned, that is required by said plans and specifications, some provision therein to the contrary notwithstanding, together with all work and material specified under headings in specifications applicable to work herein contracted for, and all that is ordinarily done or furnished by contractors or workmen, in carrying on such work, together with and subject to all changes, alterations, additions, deductions and details, as herein provided for, and maintain same in place until fulfilment of this contract. All of which first party agrees to do and perform in good, true, perfect, prompt and workmanlike manner, and to satisfaction and acceptance of second party, the architect and owners of said building, and all at the cost to second party as herein provided. Where the word "work" occurs in this contract it shall be held to mean and refer to labor, work and material the same as though each time repeated. The plans and specifications above referred to are same as are furnished by the architects, Proudfoot and Bird, and are on file with the college authorities.

Article 2. Second party shall have the right to furnish further details with written explanations, to illustrate and show the work to be done and furnished, and first party agrees to conform to the same as part of this contract, the same as though fully set out in original plans and specifications, but this provision shall not require second party to plan or lay out any of first party's work. Second party shall have the right to make any and all changes in the work called for by this contract, plans and specifications, and in the amount of, or character of, work to be furnished, that they may be directed or allowed to make, by said architect, or owners, without in any way making void or otherwise affecting the provisions or covenants of this contract. The order from second party for such changes, together with the price, as herein provided for, shall become a part of this contract, and be complied with by both parties the same as though fully set out in original plans, specifications and contract, and such changes, the order for same, nor agreed value of the changes, if agreed on, shall in no manner relieve or release the sureties on any bond given to guarantee this

contract, but becoming a part of this contract are covered by said bond. The value of and agreed cost to second party for the work furnished, in accordance with this provision, shall be in proportion to this contract price for the work, herein contracted for, unless the parties agree in writing as to the value of such changes, which they are authorized to do, in which case all interested parties shall be bound thereby. But first party agrees to make no alterations in the work contracted for, or shown or described by the drawings and specifications, except upon the written order of the second party, and the production, by first party, of such written order, calling for work not already covered by this contract, shall be a condition precedent to first party's right of recovery for any work or material claimed as extras. This provision for changes shall not be used so as to decrease by more than one-half the total amount of the work now contemplated by this contract. Should first party for any reason not covered by these provisions furnish work, labor or material of a poor or less expensive grade or kind, or of less amount or value, than is herein contracted for, and if same is accepted and allowed to remain, there shall be deducted from the cost to second party, and from the amount otherwise to be paid to first party, such an amount as the work so supplied is worth to furnish, or should have cost, less than the work herein contracted for. It is agreed that no verbal order, objection, claim or notice by either party to the other shall be of effect or binding, and no evidence of such order, objection, claim or notice shall ever be introduced in any suit in law or equity wherein these parties are interested, both parties agreeing to execute and deliver in writing all communications from them by which the other party is to be charged, notified, or affected, and when same are given verbally they shall be held as not material or binding, and none of the provisions of this contract, plans or specifications, shall be held as not material or binding, and none of the provisions of this contract, plans or specifications, shall be held to be waived, or interpreted, by second party, by reason of any act whatsoever, or in any manner, other than by an express waiver, or definitely agreed interpretation thereof in writing, signed and sealed by second party, and it is agreed that no evidence shall be introduced against second party of any other waiver or interpretation. All work done or furnished by first party, and chargeable to second party, on said building, shall be held to have been done under this contract. * * *[1]

Defendant claims that it was released because of certain changes made in the contract, and it offered testimony to show the following, among other changes, to wit: That cement was omitted and lime used for mortar; that mortar color was entirely omitted; that

[1] Part of excerpts from contract omitted.

arches not called for by the contract were put in over certain coal doors; that a partition wall was entirely omitted; that the height of the gables were increased something like sixteen inches, and various other matters, which it is claimed were not covered by the plans and specifications. It also offered some testimony of changes which the court would not allow to go before the jury unless defendant would show that plaintiff and Glattfeld agreed thereto. Plaintiff admitted many of these changes, but contended that they were authorized by the contract, and were in no manner a change of the contract itself. In other words, it insisted that all changes were made in accord with the provisions of the contract, and that the obligations between plaintiff and the principal, Glattfeld, under the contract were in no manner changed. The trial court submitted the question of change of contract to the jury, but differentiated between changes of contract and change in manner of doing the work under the contract. Turning to the contract, it will be observed that it expressly provides that changes may be made, and that such changes, if agreed upon, should in no manner relieve or release the sureties on any bond given to guarantee the contract. That such a provision is valid we have no doubt. See Bartlett v. Stanchfield, 148 Mass. 394 (19 N. E. 549, 2 L. R. A. 625); Consaul v. Sheldon, 35 Nebr. 247 (52 N. W. 1104); Northern Light Co. v. Kennedy, 7 N. D. 146 (73 N. W. 524); Abbott v. Gatch, 13 Md. 314 (71 Am. Dec. 635).

But defendant strenuously insists that, while as between Glattfeld and Bartlett & Kling they might under the contract make any changes they chose, they could not make these changes orally without releasing the defendant as surety. In other words, its insistence is that any change made in the contract, or in the manner of doing the work not made by written order of Bartlett & Kling, released it from liability. This presents the most troublesome question in the case. As a general proposition we would agree with defendant that a change in the manner of the doing of work under a contract amounted to a change of the contract. But as the contract in question authorized the making of any and all changes in the work called for by the contract, plans and specifications, the trial court committed no error in submitting to the jury the question of change in work as distinguished from change in contract, and left it to the jury to say whether or not there was any change in the contract itself.

Reverting now to the manner in which the changes should be made, and whether or not the surety is released in the event we find that there were changes made in the work without the written order of Bartlett & Kling, we are constrained to hold that the provision for the written order, while for the benefit and protection of both parties, did not in any way prevent oral direction for changes. Without the written order for a change Glattfeld could

not recover any increased compensation because of extra work or material. Article 2 of the contract provides for changes in the work called for by contract, plans and specifications that may be directed or allowed by the owner or architect without in any manner making void or affecting the provisions of the contract, and that such changes, the order for the same, or the agreed value of the changes agreed upon should not in any manner relieve or release the sureties on any bond given to guarantee the contract. There is nothing contrary to law or public policy in this, and no reason for not restricting and enforcing the provision. The first party agreed to make no changes or alterations in the work except upon written order of Bartlett & Kling; and, as a condition precedent to a right of recovery for any work or material claimed as extra, he (Glattfeld) was required to produce such written order from Bartlett & Kling. Again it was provided that all work done or furnished by Glattfeld and chargeable to Bartlett & Kling on said building should be held to have been done under the contract. Alterations and changes in the contract were allowed ad libitum, provided they were directed or allowed by the owner or architect. But Glattfeld could not make them without a written order, nor could he recover anything as extras without producing this written order. It was for Glattfeld to get the written order if he desired authority to make the change on his own motion, and in no event could he recover any extra compensation without producing the order. The order was for his benefit, and while the parties themselves might make verbal changes which under the contract would be binding upon all, Glattfeld could not recover anything therefor without the production of the written order. Did a verbal change in the work, without a written order from Bartlett & Kling, release the defendant? That is the pivotal question in the case. If the contract had provided that no changes could be made except in writing or by written order, we should be inclined to hold that verbal change, although valid and enforcible between the parties, would, if carried out, release the sureties. See, as supporting this view, Abbott v. Gatch, 13 Md. 314 (71 Am. Dec. 635); Village of Chester v. Leonard, 68 Conn. 495 (37 Atl. 397); Consaul v. Sheldon, 35 Nebr. 247 (52 N. W. 1104); Bartlett v. Stanchfield, 148 Mass. 394 (19 N. E. 549, 2 L. R. A. 625); Northern Co. v. Kennedy, 7 N. D. 146 (73 N. W. 524); Hayden v. Cook, 34 Nebr. 670 (52 N. W. 165); Ritchie v. State, 39 Wash. 95 (81 Pac. 79); Erickson v. Brandt, 53 Minn. (55 N. W. 62); Risse v. Mill Co., 55 Kans. 518 (40 Pac. 904).

It is true, of course, that sureties on a bond to secure the performance of a building contract are discharged by any substantial change or alteration of the plan of work, unless the right to make such change or alteration is expressly given in the bond itself, or in the contract which it secures. Morgan Co. v. McRae et al., 53

Kans. 358 (36 Pac. 717); United States v. Freel, 186 U. S. 309 (22 Sup. Ct. 875, 46 L. ed. 1177), and cases cited. And in this connection it is entirely immaterial that the surety enters into his obligation for pay. Lonergan v. San Antonio Co. (Tex.), 104 S. W. 1061. But the surety may by his contract consent, in advance, to any changes or alterations which may be made in the character of the work, or in the manner of doing it. Hohn v. Shideler, 164 Ind. 242 (72 N. E. 575); Cowles v. Guaranty Co., 32 Wash. 120 (72 Pac. 1033, 98 Am. St. 838); Pac. Co. v. Guaranty Co., 33 Wash. 47 (73 Pac. 772); Grafton v. Hinkley, 111 Wis. 46 (86 N. W. 859); Smith v. Molleson, 148 N. Y. 241 (42 N. E. 669). Most of these cases hold that, even if there be a provision for a written order, as in the case at bar, change in the manner of doing the work, or alteration of plans, without written order will not release the surety. This is especially true where the changes do not materially alter the contract price of the cost of the building. Many cases hold that, even with such provision as we find in this contract as to alteration or change of plans and manner of doing the work, the changes or alterations which may be made without releasing the sureties are those which do not materially affect the undertakings of the contractor; that if the work is substantially changed without the written order referred to, or even with such order, the surety is released. See House v. Am. Surety Co., 21 Tex. Civ. App. 590 (54 S. W. 303); Miller v. Ft. Smith Co., 66 Ark. 287 (50 S. W. 508); Erfurth v. Stevenson, 71 Ark. 199 (72 S. W. 50). In one of these cases it is said that the alterations which may be made without discharging the surety are such minor ones as owners often wish to make in the plan of the buildings which are under construction, and which do not greatly affect the undertakings of the contractor. See also Consaul v. Sheldon, supra. Some of the cases go to the extent of holding that the provision as to the written order is for the benefit of the surety, and that any change, whether of benefit or advantage to the principal in the bond made without a written order, will release the surety. Of these are Burnes v. Deposit Co., 96 Mo. App. 467 (70 S. W. 518); Evans v. Graden, 125 Mo. 72 (28 S. W. 439); Lumber Co. v. Gates, 89 Mo. App. 201; and Beers v. Wolf, 116 Mo. 179 (22 S. W. 620). These cases seem to be in the minority, and after all the pivotal question is the construction of the contracts and agreements between the parties.

Going back now to the contract, we are constrained to hold that the defendant consented to all changes as were made in the manner of doing the work, and that the provision for the written order was for the protection of the plaintiff, and that they might waive the same without releasing the surety company. See, as supporting this view, Smith v. Molleson, 148 N. Y. 241 (42 N. E. 569); DeMattos v. Jordan, 15 Wash. 378 (46 Pac. 402). Moreover, Glattfeld, the principal on the bond, agreed that he would make no

changes without the written order, and the surety company, defendant herein, promised that Glattfeld would perform all the obligations of the contract on his part. Manifestly the surety can not rely upon a default of the principal which it promised he would not make. It is not too much to say that the changes, if any were made, were not such as entitled Glattfeld to additional compensation, and for that reason he did not insist upon the written order therefor. He might waive this requirement as to a written order, and we are inclined to the view that a written order was not required, save where the contractor was of the opinion that the changes and alterations were such as entitled him to additional compensation. Surely he could not claim anything for extras without this written order, unless he was able to show a distinct and independent contract therefor. This is the rule announced in the Bartlett case, supra, and we believe it to be sound. * * *[2]

Having considered the controlling points in the case, and finding no prejudicial error, we reach the conclusion that the judgment should be, and it is, affirmed.

ERFURTH *v.* STEVENSON

71 *Ark.* 199, 72 *S. W.* 49 (1903).

Battle, J.: On the 4th day of April, 1898, Erfurth & Seibert entered into a written contract with E. H. Stevenson, by which they agreed to erect and construct for him a two-story brick residence, with a stone foundation and roof covered with Oregon cedar shingles, "except foundation, cut stone, brick work, plastering, painting, plumbing and trimming hardware," in a good and substantial and workmanlike manner; and Stevenson agreed to pay them therefor the sum of $2,670; and it was agreed that no sum exceeding seventy-five per cent. of the value of work done and materials furnished and used should at any time be paid to them before they fully complied with and performed their contract. A provision for alterations in the building was made in the contract as follows:

"Article 13. That the party of the first part, through his architect, may require alterations to be made in the construction, arrangement or finish of the work from that herein, and in said specifications, plans or drawings, expressed, without annulling or invalidating this agreement in any particular, and in case of any such alterations the increase or diminution of expense occasioned thereby shall be added to or taken from the contract price of the entire work; and that a description of the changes so to be made, together with the expenses of making the same, shall be attached

[2] Part of opinion omitted.

to this agreement before said changes are executed, or otherwise shall not be binding on said first party. And it is further agreed that, in case the parties hereto can not agree as to the amount to be added to or taken from the contract price of the entire work; and that a description of the changes so to be made, together with the expenses of making the same, shall be attached to this agreement before said changes are executed, or otherwise shall not be binding on said first party. And it is further agreed that, in case the parties hereto can not agree as to the amount to be added to or deducted from the said contract price on account of the contemplated change, then and in such case the party of the first part shall have the right under this contract to have other than the second party (Erfurth & Seibert) execute such changes during the progress of the building and work aforesaid."

On the 4th of April, 1898, the same day on which the contract was executed, Erfurth & Seibert, as principals, and John Schaap and S. A. Williams, as sureties, executed a bond to E. H. Stevenson, and thereby bound themselves to him in the sum of $2,670; conditioned that, if Erfurth & Seibert should perform their contract with Stevenson, the same should be void.

On the 7th day of May, 1898, Stevenson and Erfurth & Seibert agreed in writing as to certain changes in the said building, as follows:

"May 7, 1898. It is hereby agreed that all roofs and gables shall be covered with 7x14 best quality black Bangor slate, with all hips connected and made tight (instead of being covered with Oregon cedar shingles, as set out in the specifications). All slate shall be laid on heavy tar felt, and all sheathing shall be No. 1 com. M. D. with all defects cut out, thoroughly seasoned, close joint and double nailed at each heaving with 10d wire nails. All tin, galvanized iron and zinc work (conductor supports coppered) shall be made of 102 Z copper instead of tin, galvanized iron and zinc as specified in specifications (except floor of balcony, which shall be of tin as specified) and all work and materials subject to the approval of the architect.

(Seal.) "E. H. STEVENSON, Party First Part.
(Seal.) "ERFURTH & SEIBERT, Party Second Part."

On the 9th day of September, 1899, Stevenson commenced this action against Erfurth & Seibert, Schaap and Williams, on their bond; and Schaap and Williams answered, and stated that they were sureties on the bond, and had been released from their obligations by the changes made in the original contract without their consent.

In the trial that followed it was proved that the changes in the contract were made without the consent of the sureties, and there was no evidence to the contrary, unless the original contract was

evidence of such consent; and that they (the changes) were not within the contemplation of the parties at the time the original contract was entered into is shown by the testimony of Goddard, the architect who drew the plans and specifications for the building, and superintended the erection of the same. He testified as follows: "At the time we were receiving estimates on Dr. Stevenson's house for the construction of it, it was contemplated to use slate for the roof, but, owing to the fact that we knew, of course, it would cost some more to use slate, * * * Dr. Stevenson decided that we would make the specifications to read shingles, raised tin and galvanized iron; and asked some of the contractors—in fact, all of them—to submit the amount extra it would cost to use slate and copper instead of shingles, tin and galvanized iron for the roof. Some of them did so, and some of them did not."

It was proved that Erfurth & Seibert drew orders on Stevenson the 9th and 10th days of February, 1899, for the amounts due for work done and materials furnished to complete the building according to the alterations made in the original contract, and that Schaap and Williams indorsed their approval upon the same. Goddard, the architect, testified that their approval was required because Stevenson had paid Erfurth & Seibert more than seventy-five per cent. of the value of the work done and materials furnished at the time the orders were drawn; and the sureties testified that they indorsed their approval because they were informed that Stevenson would not pay the orders without it.

Plaintiff recovered judgment, and the defendants appealed.

Were John Schaap and S. A. Williams, sureties on the bond of Erfurth for the performance of their contract to erect a building for E. H. Stevenson, discharged by the alteration of the contract?

In O'Neal v. Kelley, 65 Ark. 550, this court held that any material alteration in the contract for the performance of which a surety is bound, without his consent, discharges the surety, and that "this is so, even if the alteration be for the benefit of the surety; for, although the principals may change their contract to suit their pleasure or convenience, they can not thus bind the surety."

In Miller-Jones Furniture Co. v. Fort Smith Ice and Cold Storage Co., 66 Ark. 287, one Wickshire contracted with the appellee to build for it a one-story brick house, and to complete the same on or before the 14th day of October, 1895. The contract contained the following stipulation: "It is further agreed that the said party of the second part may make any alterations, deviations, additions or omissions from the aforesaid plans, specifications and drawings, or either of them, which they shall deem proper, and the said architect shall advise, without affecting or making void this contract; and in all such cases the architect shall value or appraise such alterations and add to or deduct from the amount heretofore agreed to be paid to the said party of the first part the excess

or deficiency occasioned by such alterations." "Wickshire gave bond for the performance of his contract, with the Miller-Jones Furniture Company as surety. He afterwards, about the 1st of October, 1895, made a supplemental contract with the cold storage company by which he agreed to make the building two stories high, instead of one, and was to receive an additional consideration of $1,175." This court held that the surety was discharged by the alterations made. Mr. Justice Riddick, in delivering the opinion of the court, said: "The cold storage company contends that the supplemental contract did not discharge the surety, for the reason that such supplemental contract was within the scope of the first contract, and was therefore assented to by the furniture company at the time it signed the bond. This contention of the cold storage company is based on a provision in the original contract permitting the owner to make alterations in the plans and specifications of the building. But we are of the opinion that the parties did not intend by this provision to authorize changes so extensive as the one complained of here. The provision referred to, which is set out in the statement of facts, permits such alterations to be made, even without the consent of the contractor, and provided that the architect shall determine the amount to be paid or deducted therefor. We can not suppose that the parties intended by this provision to permit the owner to make great and extensive changes in the plan of the building and to force the contractor to complete it in conformity therewith, at such compensation as might be allowed by the architect. The fact that these alterations in the plan could be made without the consent of the contractor forces us to the conclusion that the alterations referred to were such minor changes as owners often wish to make in the plan of buildings while they are under construction, and which do not greatly affect the undertakings of the contractor.

In Consaul v. Sheldon (Nebr.), 52 N. W. 1104, 1107, cited by the court in Miller-Jones Furniture Company v. Fort Smith Ice and Cold Storage Company, it is said: "A number of changes and alterations were made in the buildings, which increased the cost thereof, after the letting of the contract and the signing of the bond. But such changes and alterations did not have the effect to release and discharge the sureties, for the reason the contracts expressly provided that the owner might make alterations in the plans of the building, and that the making of the same should not release the sureties. Each contract contained this stipulation: 'Should the proprietor, at any time during the progress of the work, require any alterations of, deviations from, or additions in the said contract, specifications, or plans, he shall have the right and power to make such change or changes, and the same shall in no way injuriously affect or make void the contract.' This provision was

ample authority for all changes and alterations which were made in the buildings. We must not be understood as claiming that the owner had the right to make such changes as he saw proper, regardless of the cost and the character and extent of such alterations. The changes and additions must be reasonable, and not materially increase the costs of the buildings beyond the original contract price."

In the contract before us, Stevenson, for whom the building was to be erected, was vested with the power to require alterations to be made in the construction of the building and in the arrangement or finish of the work, as specified in the contract and specifications, plans and drawings referred to therein. He could do so without the consent of the contractors, Erfurth & Seibert. But they were not compelled to do the additional work, or furnish the materials made necessary by the alterations. If they refused to do so, or failed to agree with Stevenson as to price, the contract provided that Stevenson might employ other parties to do such work and furnish the materials. But nevertheless, as said in Miller-Jones Furniture Co. v. Fort Smith Ice and Cold Storage Co., "the fact that these alterations * * * could be made without the consent of the contractors forces us to the conclusion that the alterations referred to were such minor changes as owners often wish to make in the plan of the buildings, while they are under construction, and which do not greatly affect the undertakings of the contractor." Any other construction of the contract would place the contractors in the position of agreeing that alterations might be made in their contract which would be materially injurious to them, which would be unnatural and unreasonable.

The right to make the alterations that were made in the contract depends upon the following clause: "The party of the first part (Stevenson), through his architect, may require alterations to be made in the construction, arrangement or finish of the work from that herein, and in said specifications, plans or drawings, expressed." The alterations made were not in the arrangement or finish of the work, as they consisted entirely of a change of materials. Were they made in the construction? In the construction of what? A two-story brick residence, with stone basement, and with roof covered with Oregon cedar shingles. Did Stevenson have the right to so alter the contract as to substitute a residence of granite for the brick residence? Certainly not. Why, then, could he substitute a slate for a shingle roof? Such a change would not be in the construction of a shingle roof, which the contractors agreed to make, but a substitute for it, which was not authorized by the contract. The evidence shows that such was not the intention of the contract. Stevenson, the party of the first part, had under consideration, before entering into the contract with Erfurth & Sei-

bert, the building of a residence with a slate roof, but abandoned it because it was too expensive, and decided to use Oregon cedar shingles instead of slate.

The price which the contractors, Erfurth & Seibert, were to receive for the building under their contract with Stevenson, before it was altered, was $2,670, and the alterations were worth and cost at least $320, which increased the cost more than eleven per cent. The change made in the building by the amended contract materially increased the cost of it beyond the original contract price, and, if binding on the sureties on the contractor's bond, increased their liability to the same extent. But the change was unauthorized by the original contract, and was made without the consent of the sureties, and discharged them from liability on their bond.

But appellee insists that, if the sureties on the contractor's bond were relieved from their obligation by the alteration in the original contract, they are estopped from taking advantage of it by the indorsement of their approval upon the orders drawn by Erfurth & Seibert on Stevenson for the amount due for labor performed and materials furnished according to such alterations. They disavowed any intention to approve the alteration of the contract by the approval of the orders, but contend that the object of their approval was to relieve Stevenson from his contract to withhold from the contractors twenty-five per cent. of the contract price until they fully and completely performed their part of the original contract.

The alterations in the original contract were made, without the consent of the sureties, on the 7th of May, 1898, and released them from their obligation. Their approval of the orders was indorsed thereafter on the 9th or 10th of February, 1899, and therefore could not have induced Stevenson to change his position in respect to his liability for the amounts paid by him on the orders of Erfurth & Seibert. He was already bound to pay for the work done and materials furnished according to the contract as altered. His position in that respect could not have been changed by the approval of the orders of Erfurth & Seibert by the sureties; and they are not thereby estopped from setting up their discharge from liability to Stevenson as such. Miller-Jones Furniture Co. v. Fort Smith Ice and Cold Storage Co., 66 Ark. 287.

The judgment of the court below against the sureties is reversed, and as to Erfurth & Seibert it is affirmed. Judgment upon the merits will be rendered here against the appellee in favor of the sureties.

Accord: Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 Pac. 856; United States v. Freel, 186 U. S. 309, 46 L. ed. 1177.

CALVERT *v.* THE LONDON DOCK COMPANY

2 *Keen* 638 (1839).

The following were the circumstances of the case:—By contract, in writing, dated the 29th day of September, 1829, Robert Streather, a builder, agreed with James Warre, the treasurer of the London dock company, on behalf of the company, to perform certain works, which were to be commenced twenty days after notice, and to be completed in twelve months from the commencement. Streather was to provide all materials and labor, in consideration of 52,200£., and being allowed to appropriate certain materials mentioned; the engineer of the company was to be the sole judge of the works, and was to employ competent persons to perform the works, if Streather failed to do so; and in that case, the costs thereof were to be deducted from the sum to become due to Streather under the contract: a provision was made for varying the price, on any variation being made in the work specified in the contract; and Mr. Warre, for the company, agreed to pay the 52,200£. by installments; vis., three-fourths of the cost of the work certified to be done every two months, and the remaining one-fourth after the full completion of the contract.

On the 3d of November, 1829, Streather, and Warburton, and Laycock, as his sureties, executed to James Warre, as treasurer of the company, their joint and several bond for the sum of 5,000£., conditioned to be void, if Streather should well and truly observe, perform, and keep, the promises and agreements contained in the contract, which, on the part of Streather, were and ought to be performed, according to the true intent and meaning of the contract.

Notice having been given, Streather commenced the works on the 28th of December, 1829, but did not complete them in twelve months, or before the 28th of March, 1831, to which day the time for completing the works was enlarged, with the consent of Warburton and Laycock.

The time having expired, the London Dock Company gave notice to the sureties that they would be called upon to pay the 5,000£. under bond.

Under these circumstances the plaintiffs filed their bill; and after alleging that the referee in the action against the company had stated that although the payments made to Streather amounted to 49,619£., the value of the work done by Streather was only 36,429£, they charged that, in executing the bond, the sureties considered, and had a right to consider, that the company, until the entire performance of the contract, would have retained in their hands so much of the contract price as by the contract they

were entitled to retain as a security for the performance of the rest of the contract; and that by advancing to Streather more than they were bound to do, the company deprived the plaintiffs of the benefit of that security, and thereby, in equity, released them from the bond; or at least, could not equitably recover against the plaintiffs any loss which they might have sustained by making such advances; and ought not to be permitted to sue the plaintiffs on the bond, for if they had not made such advances they would not have sustained any loss by the nonperformance of the contract.

The common injunction, for want of answer, was obtained, and no motion was made either to dissolve it, or to extend it to stay trial.

It was now asked that the common injunction which has been granted might be made perpetual, and that the defendants might pay the costs of suit.*

THE MASTER OF THE ROLLS (after stating the case) proceeded:—The defendants do not dispute the fact that their advances to Streather exceeded the sums which they were bound to advance under the contract, but they say that the increased advances were made for the purpose of giving Streather greater facility to perform the contract. It is said that the performance of the work by Streather was impeded by his want of funds; and that by the advances made to him he was enabled to do more than he otherwise could have done—and that to assist him was to assist his sureties: and it was only for the purposes of affording that assistance that the company did more than they were obliged to do.

The argument, however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficial to the surety—and the answer has always been that the surety himself was the proper judge of that—and that no arrangements, different from that contained in his contract, is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is, whether what has been done lessens that security.

In this case, the company were to pay for three-fourths of the work done every two months; the remaining one-fourth was to remain unpaid for till the whole was completed; and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete the work, if he did not, and thus it materially tended to protect the sureties.

*Part of the statement of the case is omitted.

What the company did was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure, which, by the contract, was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands one-fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances, I think, that their situation with respect to Streather was so far altered that the sureties must be considered to be discharged from their suretyship.

I think, therefore, that the plaintiffs are entitled to have the injunction made perpetual; and that they are also entitled to the costs of this suit.

The plaintiffs appear not to have had a complete legal defense, though they had a case which reduced the damages to a nominal amount. They would not, however, anticipate the result of the action. They had an equitable defense; and, under the circumstances of this case, if an application had been made for the purpose, I do not think that the plaintiff in equity would have been ordered to give judgment; and, after the verdict with nominal damages, the application to the court of king's bench made by the plaintiffs at law, made it important for the defendants there to proceed with their bill in equity.

See also Warre v. Calvert, 7 Ad. & El. 143.

FIRST NATIONAL BANK *v.* FIDELITY AND DEPOSIT COMPANY

145 *Ala.* 335, 40 *So.* 415, 5 *L. R. A. (N. S.)* 418, 117 *Am. St.* 45 (1906).

This was an action by appellant against appellee upon a contract of suretyship entered into between appellant and appellee as the surety of John W. Hood & Co., who had a contract to erect a building for appellant. The bond or contract of suretyship was in words and figures as follows: "The State of Alabama, Montgomery County. Know all men by these presents: That we, John W. Hood & Company, as principal, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto First National Bank of Montgomery in the sum of fifteen thousand dollars, for the payment of which we bind ourselves, heirs and executors, administrators and assigns. Sealed with our seals and dated this 7th day of March, A. D. 1901. The condition of this obligation is such that, whereas, the above-bounded John W. Hood & Co. did on the 7th day of March, 1901, enter into a contract, as original or general contractor, with said First National Bank of Montgomery

to build and complete a six-story and attic fireproof building in the city of Montgomery, according to plans and specifications furnished and prepared therefor by Lockwood & Smith, architects, at and for the price of forty-four thousand dollars; and whereas, under article 1 of chapter 71 of the Code of Alabama of 1896, of force from February 17, 1898, certain liens are provided for mechanics and materialmen, and certain duties are required of owners and proprietors, in this: that if the owner or proprietor or his agent be notified in writing that certain specified material will be furnished to the contractors for use in the building or improvements on the land of the owner or proprietor at certain specified prices, he shall be liable therefor, unless he objects thereto, and other provisions as to liens of mechanics and materialmen as to any unpaid balance that may be due by owner or proprietor to the original contractor, and for demanding of the original contractor the complete list of all materialmen, laborers, and employes who have furnished any material, or have done any labor or performing any service, or who may be under any contract or engagement to furnish any material or to do or to perform any service to such contractor for or on such building or improvement, with the terms and price thereon, and for retaining and paying such claims, for any unpaid balance remaining in the hands of the owner or proprietor, that any such sum may be retained and paid such mechanic, laborer, or materialman by the owner or proprietor if he wishes, and shall be a credit on this contract as if paid to the contractors; and whereas, said John W. Hood & Co., as said original contract calls for, have agreed to furnish all the material and labor required in the erection and completion of said building herein referred to and described, at and for the price hereinbefore recited and according to the plans and specifications hereinabove referred to, and to erect and complete said building according to said plans and specifications: Now, therefore, we, the undersigned, agree to secure and hold harmless the First National Bank of Montgomery against all contracts, claims, and demands of all materialmen, laborers, or employes who may furnish any material or thing or may do or perform any service, or who may be under a contract or agreement to furnish any material or thing or to do any labor or perform any services to said Hood & Co., as aforesaid contractors, for or on such building or improvement, and to exempt said First National Bank of Montgomery, owner and proprietor, from making any demands of the contractor for a complete list of all materialmen, laborers, and employes, from retaining in his hands any balance due, and to pay any claim of mechanics, laborers, and materialmen of which he may have notice, or from any demand or liability whatsoever to any other person than Hood & Co., the original contractors herein. We, the undersigned, promise and agree that the said Hood & Co. erect and complete said building according to said plans and specifications above mentioned,

and, further, this bond shall cover and include any sum owing by said contractors as liquidated damages for a failure to complete contract in the specified time. But if the said Hood & Co. shall secure and hold harmless the said First National Bank of Montgomery as aforesaid, from all loss, liability, and damages as hereinbefore particularly mentioned and set forth, this agreement to be void; otherwise, to remain."

The building contract and specifications are also set out in full. The part of said contract relating to the payments by the bank to the contractors is in following words: "Payments are to be made upon certificates of the architect and upon estimates made for material when delivered at and for said building, from which shall be reserved 25 per cent. of the cost of such material, and upon like certificates of the architect and their estimates made, upon the 1st of each month, payments are to be made for work erected into said building, less what has been previously paid for the same as materials and from which shall be reserved out 10 per cent. thereof. And the said 10 per cent. so reserved out of sum so paid for material and for work erected into said building is to be paid after the work shall have been completely finished, delivered, and accepted by the party of the first part, provided that a certificate shall be obtained by the party of the second part from the clerk of the office where liens are recorded, and signed by said clerk, testifying that at the time when the payment is due the building is free from all liens and claims chargeable to the party of the second part."

In reply to the complaint, the defendant set up that it was surety, and that in violation of its agreement the terms of payment set out in the contract of building upon the terms of which defendant agreed to become surety and did become surety for the builders were violated by the bank, in that it made the payment in utter disregard of said contract; wherefore the surety was released. The evidence tended to support the plea strongly.

Simpson, J.: This was an action by appellant against appellee, based upon a bond which appellee executed March 7, 1901, as surety for John W. Hood & Co. to secure the faithful performance of a contract by which said Hood & Co. had agreed to furnish materials and erect a certain building in Montgomery, Ala.

The first point raised by the pleadings, and strenuously and ably argued in the briefs of both the appellant and appellee, is whether or not, in a case like this, where the building contract specifies that payment shall be made as the work progresses upon certificate of the architect, and estimates for material when delivered, reserving 10 per cent. to be paid only when the work is completed, and the owner undertakes to pay in a different way, as by advancing money to the contractor to be repaid as the estimates and certificates are made, and paying for lumber before it is delivered, without regard to the 10 per cent. reduction, the surety is released. The appellant

relies upon the case of Fidelity and Deposit Company of Maryland v. Robertson, 136 Ala. 379, 34 So. 933, and especially the remark of the court, on page 409 of 136 Ala., page 943 of 34 So., to the effect that the provision of the contract, authorizing the temporary reservation from payments of 15 per cent. of estimated earnings, was solely for the benefit of the original contractor, and one which, in the absence of any prohibition in the bond, the original contractor might waive without the consent of the surety." It is a maxim of the law that all parties, whether principal or surety, who reduce their contracts to writing, have a right to insist upon the terms of the contract as written, and it does not lie in the power of the courts to say that, although a party has contracted to do one thing, yet he has done something else, which is more beneficial to the other party, and is therefore entitled to the enforcement of the contract. When a party enters into a contract to do certain work and on certain terms, and procures a surety to guarantee the faithful performance of the work, the surety necessarily contracts with reference to the contract as made. The terms of the contract become a part of the terms of the bond. Otherwise the surety could never know what obligation he was assuming. The contracts were made at the same time. The surety's bond recites that, whereas the building contract has been made, etc. Then, in the absence of any explicit declaration to that effect, it is difficult to see how a court can undertake to say that certain provisions are made for the benefit of the principal alone, and can be waived or changed by him, without the consent of the surety. This is a matter, however, that has been so thoroughly discussed by the courts in England and in this country, and the trend of the best authorities is so evident, that it seems useless to go over the arguments of the courts.

The leading case in England is that of Calvert v. London Dock Co., 2 Keen 638. And the Supreme Court of the United States, in an able opinion by Justice White, in which he reviews the decisions of that court and others, plants itself squarely on the English doctrine, declaring that "the rulings of this court have been equally emphatic in upholding the right of a surety to stand upon the agreement, with reference to which he entered into this contract of suretyship, and to exact compliance with its stipulations." Prairie State Bank v. United States, 164 U. S. 227, 237, 17 Sup. Ct. 142, 41 L. ed. 312. Equally emphatic are the cases of Simonson v. Thori (Minn.), 31 N. W. 861; United States v. Am. B. & W. Co., 89 Fed. 925, 930, 32 C. C. A. 420; Backus v. Archer (Mich.), 67 N. W. 913, and cases cited; Stearns on Suretyship, p. 79, and note; 27 Am. & Eng. Ency. Law, 495. See also Manatee County State Bank v. Weatherly, 144 Ala. 655, 39 So. 988. It is unnecessary to extend this opinion by citing all the cases that could be produced, or by going over the arguments in those here cited. The declaration of the principle is clear and the reasoning satis-

factory. We are compelled to hold that the court below committed no error in overruling the demurrers to the several pleas setting up the defense mentioned. The case of Fidelity and Deposit Company of Maryland v. Robertson, supra, in so far as it conflicts with this opinion, is overruled. The case of Saint v. Wheeler & Wilson Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. 210, is not in conflict with this opinion, as in that case it is distinctly stated that the claim sued on was not in any way connected with the additional duties which had been placed on the agent, and which were distinct from the duties guaranteed; that, although the agent's salary had been reduced, yet the settlement in question was based on the original contract at the original salary; also that allowing the agent to retain his wages out of weekly collections was not an alteration of the contract, as it did not provide the manner in which he was to be paid. Nor is there any conflict with the case of White's Admr. v. Life Association of America, 63 Ala. 319, 35 Am. 45; for that case announces the doctrine in all its strictness in regard to the discharge of the surety by an alteration of the terms of the contract, but merely states that mere indulgence does not constitute such a change. In the case of Perrine v. Fireman's Inc. Co., 22 Ala. 575, the defendant was surety on a note given by a stockholder to the bank, and the only point decided by the court was that the fact that the corporation had the power, under its charter, to prohibit the transfer of the stock of the stockholders, who were indebted to it, did not make it obligatory on it to do so in order to protect the surety. The case of Stephens v. Elver (Wis.), 77 N. W. 737 (referred to in the brief of appellant), really indorses the general doctrine hereinbefore stated and places its decision distinctly upon the ground that "the alleged advances were so inconsiderable and trifling in amount as not to constitute a material variation of the contract, and upon the further fact that the plaintiff is not in a position to insist upon release, because it was at his suggestion that Pickering made the request for an advance." Page 740. Without passing upon the question as to whether that court was right in undertaking to say that the alteration was not material, we only cited it to show that it does not militate against the position taken in his opinion. We do not say that there may not be some slight deviation, so clearly immaterial as not to affect the liabilities of the parties, but that is not this case. In the case of Smith v. Molleson (N. Y.), 42 N. E. 670, which is greatly relied upon by appellant, the decision was really based on the construction of the contract; the court holding that, in making payments, the value of the stone, which had been quarried, but not placed in the building, should be taken into consideration, and under that construction there had been no overpayment. The court affirms the doctrine that the surety "has the right to insist upon

the strict performance of any condition for which he has stipulated, whether others would consider it material or not." Page 670, second column. Allusion is also made to the special provisions in that contract to the effect that the owner was "at liberty to make any alterations, deviations, additions, or omissions from the said contract," but the court says "it is not important to consider the real scope of this clause."

Without subscribing to any intimations of the court on that point, it may be remarked that the corresponding provision in the contract now before this court differs from that in the important particular that, after referring to the alteration, etc., it goes on to state that it shall not "make void the contract, but the difference shall be added to or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation," showing clearly that the allusion is not to the manner of payment, but to the alteration in the work. While, as between the original parties to the contract, either party may waive any of its provisions, yet when a third party becomes interested in the contract by binding himself to its faithful execution, the contract becomes a part of his obligation, and its provisions can not be waived so as to affect his interest without his consent. We hold that under the contract and bond in this case, which constitute one transaction, if the plaintiff did not pay for the work and the material in the manner provided by the contract, but instead thereof, by an arrangement made either at the time the contract was made, or afterwards, with the contractor, without the consent of the surety, permitted the contractor to overdraw his account, so that considerable amounts of money were paid to him before any certificates were issued by the architect, and the material was paid for, without any estimate and before delivery, and without any regard to the retention of the percentage required, trusting to the certificates and estimates to be credited on said general account, then this was such a departure from the terms of the original contract as to release the obligation of the surety. The cases referred to by appellant's counsel, which hold that, where a collateral security has been released, or lost, without the consent or fault of the surety, said surety is released only pro tanto, do not apply to a case like this, even as to the 10 per cent. reserve. Said provision in this case is one of the conditions of the contract, and it can not be said that it is a mere security for the payment of such money; but it is reserved as much as a stimulus to insure the completion of the work by the contractor, as for a mere security of the amount of money.

The judgment of the court is affirmed.

Tyson, Anderson and Denson, JJ., concur. McClellan, C. J. (sick), and Haralson, J. (disqualified), not sitting. Dowdell, J., dissents.

See also Doherty v. Empire State Surety Co., 1 Tenn. Ct. of Civ. App. 221; Ryan v. Morton, 65 Tex. 258; Simonson v. Grant, 36 Minn. 439, 31 N. W. 861; County of Glenn v. Jones, 146 Cal. 518, 80 Pac. 695; Kunz v. Boll, 140 Wis. 69, 121 N. W. 601.

JAMES BLACK MASONRY AND CONTRACTING COMPANY, RESPONDENT, *v.* NATIONAL SURETY COMPANY, APPELLANT

61 *Wash.* 471, 112 *Pac.* 517 (1911).

CHADWICK, J.: Respondent took a contract for the erection of the Leary Building, in the city of Seattle. He let a subcontract to the Ellis Granite Company, to cut and place all the stone in the first two stories of the building. It was agreed that the entire work should be finished within one hundred and twenty-five days from the date of the contract, which was December 12, 1908. The work was delayed, through no fault of the Ellis Company, for about sixty days, but was finally finished without any changes or alterations material to this inquiry. The contract price was $16,500, to be paid as follows:

"On the 1st day of each month the contractor shall render to the general contractor an itemized statement of the work placed in the building during the preceding month, which statement shall be verified by the architects, and upon the certificate of the architects there shall immediately be paid to the contractor by the general contractor eighty-five (85) per cent. of the amount of work finished. On the final completion of the work and the acceptance thereof by the architects, as evidenced by their certificate, the remainder of the contract price, together with the percentage retained, shall be immediately payable."

The contract provided that, "the contractor shall furnish a bond in the amount of $5,000, for the proper performance of the terms of this agreement." Appellant furnished this bond, which by its terms provided that the contract should be a part of its contract of indemnity. The bond contained the usual provisions with reference to notice to the surety of any material alterations or changes in the contract.

On February 3, 1909, the Ellis Company gave notice that it was ready to begin the work of installing the stone, but owing to some delay on the part of the general contractors, it was not permitted to begin work of placing the stone at the time provided in the contract. This delay continued for sixty days. The Ellis Company, having no other immediate source of income, was unable to meet its pay rolls, and accordingly called upon respondent to make some advances. Respondent, in conjunction with and by the direction of

the Leary Company, and having satisfied itself that a considerable quantity of the stone—about $7,000 worth—had been cut and was in the yards of the Ellis Company, ready for delivery, did make the following advances: February 11, 1909, $500; February 17, 1909, $2,000; March 6, 1909, $1,000. It being apparent to respondent and the Leary Company that additional advances would have to be made, their respective superintendents went to the local agent of the appellant, and asked him to approve in writing of the payments already made, and give his indorsement to the payment of such additional sums as were necessary to meet the expense account of the Ellis Company. This request was referred by the agent of appellant to its attorneys, and on the next day respondent and the Leary Company were informed that appellant conceived the contract to have been broken, and that it was no longer liable on its bond, and accordingly refused to approve the payments that had been made or to give its indorsement to the additional payments required.

On March 26, respondent notified the Ellis Company to forthwith proceed with the erection of the granite for the Leary Building, "under and pursuant to your contract dated December 12, 1908," and on March 30, 1909, respondent notified the appellant that the Ellis Company had "defaulted in the performance of its contract and has refused to proceed therewith, and further that the wages of the employes of said company for the week ending March 20, 1909, were due and had not been paid, and no work has been done under said contract since that date." This notice was of date May 25, and repudiated by appellant, on the theory that, by the advancements referred to and other advancements made thereafter, it was no longer liable, and refused to recognize any further liability on the bond.

The court found that, when the Ellis Company made default in payment of its workmen and failed to proceed with the work of installing the stone in the building, it was impossible for the respondent to procure the stone elsewhere without great delay, which would have been disastrous to respondent and subjected it to great loss. At or about March 26, and prior to the notice given by the respondent to the appellant that the Ellis Company had abandoned its contract, its president and secretary went to respondent and to the Leary Company and told them that the Ellis Company would not be able to carry out its contract, that it was without funds, and that the party who had been financing it had refused to make any further advances, and thereupon offered to respondent and to the Leary Company the material in its yards, and the use of its yards and appliances, in the event that they desired to perform the work upon their own account. Whereupon the Ellis Company discharged its bookkeeper, took out its telephone, and from that time on did nothing in the way of performance of its contract. The Leary

Company and respondent put their own man in charge of the yard as timekeeper and bookkeeper, and employed the president of the Ellis Company as superintendent at a salary of $50 a week, and at each week end the Leary Company drew a check to cover the pay rolls and necessary expenses. This check was drawn in favor of Mr. Sayre, the superintendent, and by him converted into cash which was paid over to the laborers. It does not appear in evidence that anything was paid by the Leary Company or the respondent over and above the actual cost of labor and material, unless it be some charges for the timekeeper, telephone, and other items which might be deducted without affecting the real question before us. The trial court found:

"That the defendant National Surety Company was not prejudiced, injured or damaged in any way or to any extent whatsoever either by the first three payments made February 11, 1909, February 17, 1909, or March 6, 1909, aggregating $3,500, and that said defendant was not prejudiced, injured or damaged in any way whatsoever by the subsequent payments made by the plaintiff to the defendant Ellis Granite Company to secure the completion of the contract of said Ellis Granite Company."

The court concluded:

"That the plaintiff is entitled to a judgment against the defendant National Surety Company for the full sum of $5,000, together with interest thereon at the rate of six per cent. per annum from the 24th day of November, 1909."

Appellant relies upon five propositions to sustain its appeal:

"First—The advancement of $3,500 before any work whatever was done.

"Second—Payment of $6,632.46 before any material was delivered upon the grounds.

"Third—Payment of $9,571.19 before any payment was due.

"Fourth—Advancements and payments at all times over and beyond the 85 per cent.

"Fifth—Making final payment without notice and without holding back reserve fund as stipulated."

The contentions of respondent are sufficiently indicated by the statement of the facts and the findings which we have quoted or summarized.

This court has held, and it is a doctrine from which we are not inclined to depart, that a compensated surety will not be relieved of his obligation unless it be shown that he has been in fact prejudiced by a breach of the contract; that is to say, the breach must not have been technical but substantial, working a pecuniary disadvantage to the surety, or depriving him of some protection or privilege reserved in the bond. Beebe v. Redward, 35 Wash. 615, 77 Pac. 1052; Cowles v. United States Fidelity and Guaranty Co., 32 Wash. 120, 72 Pac. 1032, 98 Am. St. 838; Title Guaranty and

Trust Co. v. Murphy, 52 Wash. 190, 100 Pac. 315; Denny v. Spurr, 38 Wash. 347, 80 Pac. 541; Heffernan v. United States Fidelity and Casualty Co., 37 Wash. 477, 79 Pac. 1095; Monro v. National Surety Co., 47 Wash. 488, 92 Pac. 280; Leghorn v. Nydell, 39 Wash. 17, 80 Pac. 833.

Respondent relies principally upon Leghorn v. Nydell, and Monro v. National Surety Co., supra. These were cases holding that payments advanced to a contractor before the time stipulated in the contract would not exonerate the bond, in the absence of a positive showing of prejudice. In each of these cases, as in others of a like nature, there was a substantial compliance with the terms of the contract by the contractor. The payment was made in accordance with the terms of the bond, and having thereafter become due by reason of a performance of the contract, it was held that the objection was technical, and the surety was held to its obligation. As was said in Cowles v. United States Fidelity and Guaranty Co., supra, the bond is subject to the contract, and was made after the contract. It is the contract instead of the bond which is primarily to be construed. And, as there suggested, the inquiry should be whether another or a new contract has been substituted for the old one. We think that in this case there was not only a substantial departure, but a clear abandonment of the original contract, and a new contract whereby respondent and the Leary Company undertook to do the work upon their own account and for their own benefit. The contract provided that payment should only be made when the stone had been placed in the building, and then upon the certificate of the architect; but without notice to the surety, payments aggregating $3,500 were made upon a $16,500 contract, before they became due and without any certification on the part of the architect.

There is evidence to the effect that, but for the delay occasioned by the Leary Construction Company, amounting to nearly sixty days, the Ellis Company could have performed its contract. It was because of the act of the Leary Company then, rather than because of the fault of the Ellis Company, that it was put in default and compelled to abandon its work. The work being taken over by the respondent and the Leary Company, the situation made by them can not be evaded by showing that accounts were kept with the Ellis Granite Company; that Sayre had been and was in name still its president, and like circumstances. Facts and legal conclusions can not be overcome by mere bookkeeping. The whole record shows that the Ellis Company never performed, nor attempted to perform, any part of its contract, and that the $3,500 or any part thereof never became due it, as was so in the cases relied upon by respondent. No obligee should assume to pay a substantial part of the contract price—as counsel for respondent contend and as it seems probable, a sum equal to or greater than the profit

on the job—without notice to the surety. Advances or overpayments are allowed and held to be without prejudice where, under the facts of the particular case, they afterwards become due to the party to whom they have been paid. But here, not only was the time and manner of the payment changed, but more than one-half of the contract price was paid before it was due under the contract. It was never paid under the contract or to the contracting party. It was paid for the actual cost of material and labor, to those who had furnished these items for the benefit of the respondent. The general rule is, if the building owner advances to the builder more than he is entitled to under the contract, the surety will be released. The rule rests upon two reasons. The one is that such advance deprives the surety of the security which the owner or principal contractor has agreed to hold for his benefit, and the loss of the inducement which otherwise would have operated on the contractor's mind to induce him to finish the work in accordance with the terms of his obligation. Hudson, Building and Engineering Contracts, 694; Pringrey, Suretyship and Guaranty, pp. 103, 138; 27 Am. & Eng. Ency. Law (2d ed.), p. 496; Peters v. Mackay, 20 Wash. 172, 54 Pac. 1122; Calvert v. London Dock Co., 2 Keen 638; Wehrung v. Denham, 42 Ore. 386, 71 Pac. 133; Gleen County v. Jones, 146 Cal. 518, 80 Pac. 695; Leiendecker v. Ætna Indemnity Co., 52 Wash. 609, 101 Pac. 219.

The case of Gleen County v. Jones, supra, is directly in point. Upon a \$5,580 contract, \$1,860 was paid prematurely, without the consent of the sureties, although \$1,900 worth of the material had been put on the ground. The motive was, as in this case, to help the contractor along with his work, and, as here, the board satisfied itself that enough material was on the ground to cover the payment. The court said:

"In our opinion the obligation of the principal was altered in a material respect without the consent of the sureties. The contractor was under the obligation of placing all the materials on the building-site before he was entitled to any money under the terms of his contract. By the payment to him before he had done so, he secured the money before performing his obligation. The pressure which would have been exerted upon him to continue in the performance of his contract and place all the materials on the site, was removed when he received the money. He received it before he was entitled to it, without the consent of the sureties. The sureties had bound themselves upon the assumption that the plaintiff would keep its contract in good faith. We can see no difference in principle if the whole of the contract price had been paid before any of the materials were placed on the ground. In such case could any one doubt that the sureties would have been exonerated? The risk of guaranteeing the construction of a building to be paid for when completed and accepted, is quite different from the risk of

guaranteeing its construction, if the whole contract price should be paid in advance. In the one case the contractor can only get the money by performing his contract, while in the other he would only pay out the money already received, in performing it. In this case the sureties agreed and guaranteed that Jones would place all the materials on the building-site, on condition that he was to receive no money until he had done so; they did not agree that if paid in advance he would place such materials on the site. By the payment, the hope of reward for further performance was lost, the temptation to act dishonestly was increased."

Counsel for respondent seeks to distinguish this case, because the contractor pocketed the money and then abandoned the contract. But the legal principle involved rests, not upon the fact that the contractor took the money and appropriated it to his own use, but upon a breach of the contract by the obligee. Where the money went is immaterial to the surety. If the owner could pay a part when nothing was due, and recover when nothing ever became due under the contract to the principal of the bond, he could then pay all, and upon abandonment hold the surety upon the plea of good motive, and that the payment was made for the benefit of the obligor. In all the cases decided by this court, and by all other courts holding that payment by the owner would not discharge the principal, the facts have been such that no prejudice resulted by reason of such payments to the surety. But in this case the surety was prejudiced, in the two essentials noticed and indorsed as sufficient by all the books; that is, that they were deprived of that security which their contract gave them, and furthermore, the contractor was relieved of the inducement to perform the labor and furnish the material stipulated in his contract.

The case most relied upon by respondent is Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669. There the contract was "to furnish, cut, set and clean" all the granite work for a building; and provided for payments in installments not to exceed a certain per cent. "of the estimated value of the work performed on the building." It was properly decided that the contract should not turn on the words "on the building," so as to render payments made on the estimates of the work done elsewhere a departure available as a defense to the surety, it being evident from the situation of the parties, the nature of the work, and other provisions of the contract, that the intention was to make the payments as the work progressed. In so holding, however, the court expressly affirmed the rule as we have announced it and as that court had previously declared it to be. The object of the courts should be to ascertain and enforce the contract as made, and not to hold the surety to a condition not within the fair contemplation of the parties. Here the contract was to pay for the work placed "in the building" during the preceding month. We have held that compensated sure-

ties would not be heard to invoke the rule of strictissima juris, but our holdings have gone no further than to hold that such sureties could not claim the same rule of strict construction available to non-compensated or voluntary sureties or guarantors. When the contract is plain and unambiguous, or when its doubtful terms have been reconciled, whether by the one rule or the other, this court has, like all others, held the parties to their contract; for, as is said in the books, "a surety is bound by the contract he made, and not by some contract which he did not make, even though the latter may be more favorable to him than the former." Sureties and guarantors are not to be made liable beyond the express terms of their contract. The only question open in such cases is to determine what the contract is and enforce it.

"It is unquestionably the well-settled rule of law that a surety is entitled to a somewhat rigid construction of his contract; but before this rule is applied, his contract is subject to the same construction as any other contract, in order to ascertain and give effect to the intent of the parties, and it is not until this is ascertained that its language is to be regarded as strictissimi juris." Pingrey, Suretyship and Guaranty, p. 67; citing Belloni v. Freeborn, 63 N. Y. 383; People v. Backus, 117 N. Y. 196, 22 N. E. 759; Locke v. McVean, 33 Mich. 473; Shreffler v. Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. 626.

The rule is stated in the last case as follows:

"The rule of strict construction, as applied to the contracts of sureties and guarantors, in no way interferes with the use of the ordinary tests by which the actual meaning and intention of contracting parties are ordinarily determined, but merely limits their liability strictly to the terms of their contract when those terms are ascertained, and forbids any extension of such liability by implication beyond the strict letter of those terms."

Here the contract is plain. It was agreed that no payment should be made until the first day of the month following the installation of the stone. The conduct of respondent and the Leary Company shows that they so understood it. The payment of $3,500 was made in defiance of the terms of the contract, and, under the authorities cited, operates to the legal prejudice of appellant. That this court has never held that the obligee of a bond was not bound to observe the terms of his contract, or that the surety was bound in any event, it is only necessary to refer to the case of Leiendecker v. Ætna Indemnity Co., supra, which is in line with an unbroken current of authority flowing from the leading case of Calvert v. London Dock Co., supra, and all holding that, when ascertained, the stipulations of the contract were binding on both parties. In the Leiendecker case, after setting out the specification that the last payment should be reserved for the protection of the surety, Judge Dunbar said:

"There was a contractual relation existing by reason of this bond between the indemnity company and the appellant. This provision was accepted by the appellant when he accepted the bond as a specification of his duties in the premises; and it seems to us that it was a fraud upon the indemnity company to neglect to notify it that a payment had been made which was not disclosed in the contract upon which the bond was given, and the making of which rendered unavailing the provision in the bond just quoted. Having accepted the bond with a provision of this kind, we think the appellant is bound by such provision."

Judgment reversed, with instructions to the lower court to enter a decree in favor of appellant.

Rudkin, C. J., and Morris, J., concur.

Dunbar, J. (dissenting)—I dissent. The whole record convinces me that the court was justified in finding that the surety company was not prejudiced to any extent, or in any way, by the payments made, and this under our uniform holdings is the test of whether the deviation is material. In the Leiendecker case, cited above, it was apparent that the payments out of order were made to the detriment of the surety company. So that the case is in no wise in point.

Crow, J., concurs with Dunbar, J.

UNITED STATES, TO USE OF ANNISTON PIPE AND FOUNDRY CO., *v.* NATIONAL SURETY CO.

92 *Fed.* 549 (1899).

In error to the Circuit Court of the United States for the Eastern District of Missouri.

This suit was brought by the Anniston Pipe and Foundry Company, the plaintiff in error, in the name of the United States, against the National Surety Company, the defendant in error, on a bond executed by the defendant on July 15, 1895, as surety for T. J. Prosser, the bond having been executed pursuant to the provisions of an Act of Congress approved August 13, 1894 (28 Stat. 278, c. 280), which is as follows:

"An act for the protection of persons furnishing materials and labor for the construction of public works.

"Be it enacted," etc., "that hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties,

with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: provided, that such action and its prosecution shall involve the United States in no expense."

T. J. Prosser, the principal in the bond, had entered into a contract with Charles B. Thompson, assistant quartermaster of the United States army, who acted for and in behalf of the United States of America, for the construction of a boiler and pump house, pumping machinery, and connections, water mains, steel trestle, and water tank, etc., for the water-supply system for the new military post near Little Rock, Ark.; and the bond contained a condition, in substance, that if said Prosser, his heirs, executors, and administrators, should in all respects duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by said contract agreed to be observed and performed by said Prosser, according to the true intent and meaning of said contract, as well during any period of extension of said contract as during the original term, and should make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in said contract, then the obligation should become void, but otherwise remain in full force and virtue. The plaintiff company sued to recover of the defendant, as surety in said bond, the sum of $842.98, with interest and costs, being the value of certain water pipe which it had supplied to Prosser, subsequent to the execution of the aforesaid bond and contract, to enable him to execute his agreement with the government, and which pipe so supplied he had actually used for that purpose, but had not paid for. For a defense to the action the defendant pleaded, and the trial court so found, that subsequent to the execution of the aforesaid bond, and the contract which it was given to secure, the government had entered into a further agreement with Prosser, modifying the terms of the original contract, or, more accurately, the specifications thereto attached, in such a manner that Prosser was required to lay only 1,866 lineal feet of six-inch water pipe in place of 3,850 feet, as specified in the original contract, and that this change in the terms of the original contract, or rather in the

plans for its execution, was made without the knowledge or consent of the surety company. In view of the change in the plans for the execution of the contract which lessened the amount of water pipe necessary to be supplied and used, the trial court ruled that the plaintiff could not recover. It accordingly rendered a judgment in favor of the defendant, to reverse which the record has been removed to this court by a writ of error.

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Thayer, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is a familiar rule of law that the contract of a surety must be strictly construed, and that it can not be enlarged by construction, and that when a bond, with sureties, has been given to secure the performance of a contract, and the principal in the bond and the person for whose benefit it was given make a material change in the contract without the consent of the surety, the latter is thereby discharged. For present purposes, it may be conceded that the finding of the lower court in the case at bar discloses such a modification of the original contract between Prosser and the United States as would fall within the rule last stated, and release the defendant company from its liability, if the United States was suing for its own benefit for a breach of some provision of the contract, the due performance of which the bond was intended to secure. Such, however, is not the case. The suit is not brought by the United States to recover any damage which it has sustained; neither is it brought to enforce any provision of the contract which was entered into between the United States and the principal in the bond. On the contrary, the action is one to enforce a stipulation found in the bond, and only in the bond, which was intended solely for the protection of laborers and materialmen who might furnish labor and materials while the contract was being executed by Prosser. The United States is merely a nominal plaintiff, and as such, under the provisions of the Act of Congress, it can not be held liable even for costs. The real plaintiff is the corporation for whose use the suit was brought, and it sues to enforce an obligation which Congress required to be inserted in the bond for its protection and for the protection of others who might furnish labor or materials while the work was in progress.

The real question to be considered, therefore, is whether the act of congress under which the bond in suit was taken constituted the United States the agent or representative of the persons who supplied labor and material after the contract and bond were executed, in such a sense that its action in consenting to a modification of the contract with Prosser must be imputed to the laborers and materialmen, and held to deprive them, as well as the government, of all recourse against the surety.

The Act of Congress of August 13, 1894, does not authorize the

United States to bring suits of its own motion against the obligors in such bonds as are therein provided for, to recover what is due to laborers and materialmen. It is not empowered to act in their behalf in that respect, but such actions can only be brought at the instance of persons who furnish labor and materials, who are authorized, without previous leave being obtained from any executive department, to sue in the name of the United States, and control the litigation precisely as they might control it if the suits were brought in their own name. It is also noticeable that in its title the act professes to be one for the benefit "of persons furnishing materials and labor," and that in the body of the act the form of the condition to be inserted in the bond for the benefit of the United States is not in terms prescribed, the only provision in that regard being that the bond shall be "the usual penal bond;" meaning, evidently, such an obligation for the government's own protection as it had long been in the habit of exacting from those with whom contracts were made for the doing of public work. On the other hand, the condition for the benefit of persons who might furnish materials or labor is carefully prescribed. Obviously, therefore, congress intended to afford full protection to all persons who supplied materials or labor in the construction of public buildings, or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be, for the labor and materials so supplied. There was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the government. The bond which is provided for by the act was intended to perform a double function—in the first place, to secure to the government, as before, the faithful performance of all obligations which a contractor might assume toward it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, the one for the benefit of the government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, the government's name being used as obligee in the latter agreement merely as a matter of convenience.

In view of these considerations, we are of opinion that the sureties in a bond, executed under the act now in question, can not claim exemption from liability to persons who have supplied labor or material to their principal to enable him to execute his contract with the United States, simply because the government and the contractor, without the surety's knowledge, have made some

changes in the contract, subsequent to the execution of the bond given to secure its performance, which do not alter the general character of the work contemplated by the contract or the general character of the materials which are necessary for its execution. When the government has executed the contract and taken and approved the bond, it ceases to be the agent of third parties whom the contractor employs in the execution of the work or from whom he obtains materials, and the rights of such persons under the bond are unaffected by subsequent transactions between the government and the contractor. If such were not the case, it would be possible for the contractor and some officer of the United States, by making some change in the contract or specifications, to deprive laborers and materialmen of all recourse against the sureties in the bond after they had supplied materials and labor of great value in reliance upon its provisions. It is not probable that such a result was contemplated by the lawmaker. On the contrary, the act bears every evidence that it was intended to provide a security for laborers and materialmen on which they could rely confidently for protection, unless they saw fit, by their own dealings with the contractor, to relinquish the benefit of the security. We are confirmed in these views by the following authorities: Dewey v. State, 91 Ind. 173; Conn. v. State, 125 Ind. 514, 25 N. E. 443; Doll v. Crume, 41 Nebr. 655, 59 N. W. 806; Kaufmann v. Cooper, 46 Nebr. 644, 65 N. W. 796; Steffes v. Lemke, 40 Minn. 27, 41 N. W. 302. The first two of these cases are very much in point. Bonds were given to the state of Indiana as obligee for the doing of public work, in pursuance of a statute of that state, which bonds contained conditions requiring, first, the faithful performance and execution of the work undertaken by the contractor; and, second, the prompt payment by the contractor of all debts incurred by him in the prosecution of the work for labor and materials supplied by third parties. It was held, in substance, that for any breach of the second condition of the bond by the contractor the right of action was in the laborer or the materialman, and that such right of action could not be defeated or prejudiced by any act done by the obligee in the bond after the bond had been taken and approved. It was accordingly ruled that changes made in the contract by the parties thereto, to wit, the contractor and the public authorities, after the bonds had been executed and accepted, would not deprive materialmen of their right to recover against the sureties in the bond. It results from what has been said that the judgment of the circuit court was erroneous upon the facts found by that court, and should be reversed. It is so ordered, and that the case be remanded for a new trial.

SECTION 4. EXTENSION OF TIME OF PERFORMANCE OF PRINCIPAL AGREEMENT

SAMUELL *v.* HOWARTH

3 Mer. 272 (1817).

The plaintiff was a guarantor for the payment of a bill of goods purchased of the defendant. The principal, at the maturity of the credit, accepted drafts payable in three months, and at the maturity of these drafts they were renewed. The plaintiff filed a bill in equity praying that the guaranty might be delivered up and canceled and that the creditor might be restrained from proceeding at law against the plaintiff.[1]

The Lord Chancellor. The guaranty given in this case is general in its terms, and must be construed, according to its legal effect, in favor of the surety.

The liabilities of sureties are governed by principles which have been long settled in equity and are now adopted in courts of law. I say, now, because the Court of Common Pleas formerly held a different doctrine. But at present it is firmly established that the same principles which have been held to discharge the surety in equity will operate to discharge him also at law. However, as the same relief is to be obtained in both, a court of equity will not send a party who is suing here to a court of law for the discharge to which he is equally entitled in this place.

The rule is this: That, if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor and the principal—not where the creditor is merely inactive. And, in the case put, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, or not; and because he, in fact, can not have the same remedy against the principal as he would have had under the original contract.

Now, in the present case, the creditor has been supplying goods to the principal debtor, from time to time, upon a certain credit, the extent of which, not being expressly stipulated between the parties, I must take to be credit given according to the usual course of trade. The surety says, I will be answerable for the amount of such goods as you shall furnish during the period from the 2d of April, 1814, to the 2d of April, 1815. It is impossible for me to

[1] Statement of case abridged

hold that this is an engagement by which he (the surety) has rendered himself liable for an indefinite time beyond the expiration of the period limited for the delivery of the goods. It can not be supposed that the plaintiff meant he could continue liable, after the 2d of April, 1815, so long as the defendant might choose to renew the bills of the principal debtor. You can not contend in support of such an extravagant proposition. It has been truly stated that the renewal of these bills might have been for the benefit of the surety; but the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is, or is not, for his benefit. The creditor has no right—it is against the faith of his contract—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety.

Injunction continued.

See also Moss v. Hall, 5 Exch. 46; Rees v. Berrington, 6 Ves. 540.

Where a wife as surety for her husband signs his note and secures it by a mortgage of her real estate, an agreement extending the time for the payment of the note which discharges her personal liability will discharge the mortgage security also. Diehl v. Davis, 75 Kans. 38, 88 Pac. 532, 12 Ann. Cas. 548.

An extension of time granted to one surety releases a cosurety to the extent of the contributory share of the one to whom the extension was given. Ide v. Churchill, 14 Ohio St. 372; Gosseraud v. Lacour, 8 La. Ann. 75; Hallock v. Yankey, 102 Wis. 41, 78 N. W. 156, 72 Am. St. 861; Waggener v. Dyer, 11 Leigh (Va.) 384.

Contra: Draper v. Weld, 13 Gray (Mass.) 580; Sherman County v. Nichols, 65 Nebr. 250, 91 N. W. 198.

PHILADELPHIA TO USE *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND, APPELLANT

231 *Pa.* 208, 80 *Atl.* 62, *Ann. Cas.* 1912B, 1085n (1911).

Opinion by Mr. Justice Moschzisker.

On December 11, 1907, the firm of Lynch Brothers contracted to erect a schoolhouse for the city of Philadelphia, to be finished by August 1, 1908. A percentage of the contract price was to be retained by the city until the acceptance of the building, and the sum of $3,723.58 for a period of twelve months after completion, as a guarantee for the sufficiency of the work. The Fidelity and Deposit Company of Maryland, the defendant, became surety on a bond given by the contractors under the city ordinance of March 30, 1896, to secure the payment to subcontractors and others for labor and materials supplied in the prosecution of the work. On November 14, 1907, the firm of Thompson Brothers, the use plaintiffs, contracted with Lynch Brothers to furnish labor and materials for certain portions of the work, and on May 14, 1908, they entered

into an additional contract. At or before the time when the debt to Thompson Brothers became due and payable, they accepted a note from Lynch Brothers, dated December 2, 1908, for an amount sufficient to cover the balance now claimed, and with an express agreement that an extension of time should be granted until the maturity of the note. This note was renewed on four occasions, with like agreements for extensions till November 19, 1909; all of the renewals and extensions were without the knowledge or consent of the surety. There was a sufficient consideration to support the several extensions, and there is no claim that the notes were taken in payment of the debt. On or before November 18, 1909, the moneys retained by the city were paid to Lynch Brothers, who became insolvent before November 19, 1909, and on November 24, 1909, were adjudged bankrupts. On February 11, 1910, this suit was instituted against the defendant company as surety on the bond, claiming a balance due and unpaid for work and material furnished by the use plaintiffs, with interest "from October 19, 1908, the date when the work * * * was completed." Affidavits of defense were filed averring the facts substantially as above set forth; the court entered judgment for want of a sufficient affidavit of defense, and the defendant has taken this appeal.

The appellant contends that the extensions of time granted by the use plaintiffs to the contractors, without notice to or consent from the surety, released the latter from its liability on the bond. This would be true if the bond were an ordinary contract of suretyship with an individual as surety. But, as we said in the recent case of Young v. American Bonding Company, 228 Pa. 373: "The trend of all our modern decisions, federal and state, is to distinguish between individual and corporate suretyship where the latter is an undertaking for money consideration by a company chartered for the conduct of such business. In the one case the rule of strictissimi juris prevails, as it always has; with respect to the other, because it is essentially an insurance against risk, underwritten for a money consideration by a corporation adopting such business for its own profit, the courts generally hold that such a company can be relieved from its obligation for suretyship only where a departure from the contract is shown to be a material variance. * * * While such corporations may call themselves surety companies, their business is in all essential particulars that of insurance. Their contracts are usually in the terms prescribed by themselves, and should be construed most strictly in favor of the obligee."

Here the bond was for the protection of subcontractors and others in the construction of a public building. It differs from the ordinary suretyship, in that it is not an obligation for the performance of any particular contract. It was given for the benefit of all persons who might furnish labor or material in the course of

29—De Witt.

the work, whether the contracts for such labor and material were in existence at the time the bond was executed or not, and without regard to the terms of purchase, whether for cash or on credit. In its nature the obligation was more of a contract of insurance than of suretyship; so long as the extensions of credit did not go beyond the two-year limit for suit fixed in the bond, and in the absence of fraud or unfair dealing on the part of the subcontractors to the prejudice of the surety, or of material harm actually suffered, the surety was not released. The surety does not aver any of these elements, but relies upon a presumption of injury because the moneys retained by the city were paid over before the expiration of the extensions. These moneys were not retained for the benefit of the surety, but, in the words of the contract, "as a guarantee that * * * (the contractors) * * * shall keep all of said work done by them in good order and repair for said period of twelve months;" nor could the subcontractors have enforced their claim against this fund: Lesley v. Kite, 192 Pa. 268.

We find no direct averment in the affidavits of defense that the surety was actually harmed by the extensions granted to the contractors, and the facts as stated therein are not sufficient in themselves to raise such a presumption. For all that appears, the contractor may have paid every cent of the cash received to other materialmen or mechanics who did work upon the building. In a case of this kind, there is no presumption that the surety company is harmed, the prejudice must be made to appear, and the suggestion of mere contingencies or possibilities is not enough.

The assignments of error are overruled and the judgment is affirmed.

See also Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 48 L. ed. 242; United States Fidelity &c. Co. v. United States, 178 Fed. 692.

An agreement made between the creditor and a stranger to extend the time of payment will not discharge the surety. Fraser v. Jordan, 8 El. & Bl. 303.

HUNT v. POSTLEWAIT

28 *Iowa* 427 (1870).

Action on a note executed by Peter Mertz and W. H. Postlewait; the latter signed the note "as surety" for the former, and those words were annexed to his signature. This suit is brought against Postlewait alone, the principal maker being a nonresident. The defense is that he was only surety, and the plaintiff had, by contract, extended the time of payment to the principal without his consent, and the principal is now insolvent. Trial to a jury; verdict and judgment for defendant. Plaintiff appealed to the general

term, where the judgment of the district court was affirmed. He now appeals to this court.

COLE, CH., J.: Upon this record and the assignment of errors, there are substantially but two points for our decision: First, as to the sufficiency of the evidence. The only testimony introduced by defendant was the deposition of the principal maker of the note; and the statement on oath of the defendant, that he was only surety and had no knowledge of and gave no consent to any agreement for extension of time for payment. The substance of Peter Mertz's testimony is found in the following extracts from his deposition:

"Int. 4. When said note became due, was the time of payment extended?

"Ans. When the note became due and payable the time was not extended to any particular time; but the plaintiff Hunt said to me, if I could use the money and make the interest on it, I might keep it. I paid up the interest for the year, but said Hunt did not ask me to pay the principal.

"Int. 5. What consideration did you pay for such extension?

"Ans. When the note was made, I agreed to pay the plaintiff twenty per cent. for the use of the money; he paid me four hundred dollars, and I gave him my note (the one in suit) for four hundred and forty dollars; at the end of the first year I paid him his interest, as agreed, at twenty per cent.

"Int. 6. How long was the time of payment on said note extended?

"Ans. I don't recollect as there was any certain time set; plaintiff merely told me, as I said before, if I could make the interest on the money, to keep it and pay him the interest. * * *

"Int. 8 How much did you pay for such extensions?

"Ans. No extensions were granted by the plaintiff except as I have explained; I paid nothing extra in consideration of his allowing the note to run, except the twenty per cent. interest originally agreed upon, and this I paid as long and as fully as I was able. The plaintiff said to me, at the end of the first year, if you want to keep the money and will pay me the interest, you can do so; at the end of the second year he said the same thing, or words to that effect. I don't recollect whether I paid him interest two or three years, but the last time I paid him I did not pay the whole interest, but agreed to pay the balance in a short time."

Having all the evidence before us, in the very language of the witness and without his presence, precisely as the jury had it, we have no hesitation in holding that their verdict was contrary to the evidence, and the motion for a new trial should have been sustained for that reason. It is apparent that there was no consideration for the agreement to let the principal keep the money beyond that which existed without such agreement; and surely that agree-

ment could not have been successfully pleaded as a defense to a suit upon the note brought at any time. Unless the agreement is made upon a consideration, and would constitute a defense to the note at some time, it can not operate to discharge the surety. Mere forbearance is not enough, even though the debtor shall afterward pay therefor more than he was obliged by law to pay. The fact that the rate of interest originally agreed to be paid, and which was afterward paid, was usurious, can not affect this case.

Second, as to the instructions. The court instructed the jury: "If on or after the maturity of the note it was agreed between the plaintiff and Mertz, the principal maker, that if Mertz would pay interest on the note at the rate of twenty per cent., the time of payment should be extended; and Mertz paid such twenty per cent., and this without the knowledge or consent of the surety Postlewait, then the surety would be released, and your verdict should in that case be for defendant."

This instruction is misleading, and is vulnerable to these objections: It leaves out of view the question whether the twenty per cent. interest was the same rate as was originally agreed to be paid; it does not require the jury to find any consideration for the agreement to extend the time of payment; nor does it require them to find that the interest was paid in advance, or pursuant to the agreement for extension. If the twenty per cent. interest was agreed to be paid by the original contract, then the subsequent agreement to pay it cast no new or different obligation upon the principal; or if there was no consideration for the agreement to extend; or if the interest was not paid in advance, and was paid pursuant to the original contract, then the surety would not be released, and their verdict should not be for defendant.

We need not notice the instructions further, as the point first above ruled will doubtless be decisive of the case.

Reversed.

See also Parmelee v. Thompson, 45 N. Y. 58, 6 Am. Rep. 33; Olmstead v. Latimer, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685; Fair v. Pengelly, 34 Up. Can. (C. B.) 611.

HARRISON BERRY *v.* BAXTER C. PULLEN ET AL.

69 *Maine* 101, 31 *Am. Rep.* 248 (1879).

Assumpsit on the following promissory note: "Palermo, December 23, 1870. For value received, we jointly and severally promise to pay Harrison Berry or bearer, one hundred dollars, in one year from date, with interest. B. C. Pullen. Surety, E. W. Pinkham." The defendant Pullen was defaulted. The other a brief statement that he signed the note declared on as surety only; that he received

no consideration therefor; that he signed it for the accommodation only of Baxter C. Pullen, as the plaintiff well knew; that, subsequent to the time when he so signed, the plaintiff, without the knowledge or consent of said Pinkham and for a valuable consideration, extended the time of payment thereof to a certain definite time, after the time of payment specified in the note, and after the maturity thereof, whereby the said Pinkham was released.

There was evidence tending to show that there was an oral agreement between the payee and the principal maker that the former would extend the time of payment so long as the latter would pay eight per cent. interest; that some time thereafter elapsed before bringing the suit, and that nothing was paid on the note. The material part of the evidence on the point raised is stated in the opinion.

The verdict was for the defendant; and the plaintiff moved to set it aside against law and evidence.

VIRGIN, J.: Probably no principle has ever been in substance more frequently repeated by courts than that a surety is entitled to have his contracts performed according to its terms; and that if any alteration, either in substance or time of performance, is made therein, without the surety's consent, by parties knowing his relation to it, he thereby becomes absolved from all further liability thereon.

The rights and liabilities of sureties are well defined. Whether or not a note, executed by two makers, discloses the fact that one of them is a surety for the other, their respective liability to the payee finds expression in the terms of the note—each being alike liable to pay it according to its tenor. Moreover it is not only the legal duty of the surety to pay the note at its maturity, but it is also his legal privilege to do so, for then he may at will seek indemnity from the principal. For whenever the surety has paid the note to the holder, he has the right forthwith to sue and recover it of the principal, in an action at law, and be subrogated to all the rights of the holder in equity, among which is a suit by the latter against the principal. If, therefore, the holder has by any act precluded or estopped himself from demanding payment of the principal, or has entitled the principal to claim exemption from payment during a single day beyond the time of the maturity of the note, his rights and remedies thereby become prejudiced, and he is thereby discharged. For while it is the privilege of the surety to become subrogated to the rights of the holder by paying, that is the extent of his rights. Therefore if the holder has bound himself, without reservation, not to receive payment from the principal, the latter may enjoin him from receiving it from the surety, who will thereby be prevented from asserting his legal and equitable rights against the principal and consequently be discharged.

One of the most common modes by which creditors let sureties

off from their liability, is by giving time to their principals. Thus if the holder of a promissory note, knowing one of the makers to be a surety for the other, agrees with the principal, without the knowledge and consent of the surety, to enlarge the time of payment thereof even for a day, the surety's liability is thereby terminated. Mere gratuitous forbearance of whatever duration inside of the limitation bar, will not discharge; for it is not the forbearance, but the contract which operates the discharge. Page v. Webster, 15 Maine 249. But before a surety, whose name was deliberately and understandingly placed upon a note to give it credit, can be thus absolved from liability, the law as well as justice and equity requires that there shall be a valid, binding contract—one founded on a sufficient consideration, and the effect of which shall be to give further definite time to the principal, without the consent of the surety.

The matter of consideration and time in such contracts is copiously illustrated by a large number of cases, English and American, collated in the notes to Lead. Cas. Eq. under Rees v. Berrington, pp. 1867 et seq., and Brandt on Sur. and Guar. ch. 14, 401 et seq.

Thus, it is said, the true question is whether the agreement to give time, or to vary the contract in any other particular, could have been enforced against the creditor, or as a cause of action. Draper v. Romeyn, 18 Barb. 166. Approved in Wheeler v. Washburn, 24 Vt. 293; Turrill v. Boynton, 23 Vt. 293; Greeley v. Dow, 2 Met. 176.

Again the test is expressed a little differently, being whether the creditor would have made himself liable to the principal by proceeding against him immediately after giving the promise of forbearance; for if he would not, the legal relation of the parties is unchanged, and there is no equitable ground for exoneration of the surety and therefore there can be no discharge. Lead. Cas., supra; Leavitt v. Savage, 16 Maine 72.

"By a valid agreement to give time," say the court in Veazie v. Carr, 3 Allen 14, "is meant an agreement for the breach of which the maker has a remedy either at law or in equity." And the authorities generally concur in holding that the requisites of a valid agreement are essential, otherwise the creditor is not bound, and the rights of the parties not changed; and if not changed, the original contract is in force and may be performed.

There are numerous cases above referred to holding that, while the absolute payment by the principal and acceptance by the creditor of usurious interest in a good consideration for an enlargement of the time of payment, an executory contract to pay such interest is not, and that therefore it will not absolve a surety. Among the cases in point is the early, well-considered case of Tudor v. Goodloe, 1 B. Mon. 322. See also Vilas v. Jones, 10

Paige 80; Burgess v. Darcy, 33 Vt. 618; Smith v. Hyde, 36 Vt. 303; Myers v. First Nat. Bank, 78 Ill. 257. In a word all concur in holding that the contract must be binding to effect the release. This rule must exclude oral contracts which the statute of frauds requires to be in writing. And so it has been expressly held. Thus, where the executrix of the acceptor of a bill of exchange orally promised to pay the holder out of her own estate, provided he would forbear to sue, and he did forbear in consequence, it was held that the drawer was not discharged, the promise being within the statute of frauds. Best, C. J., said: "If the promise made by the executrix be considered a promise to pay the debt with interest out of the assets, it gave no claim to the holder beyond what the bill gave him. * * * If it is to be taken to be a personal promise of the executrix, it is void under the statute of frauds, not being in writing." Philpot v. Bryant, 4 Bing. 719.

To the same point is Agee v. Steels, 8 Ala. 948; the promise there being within another section of the statute of frauds—one relating to an interest in land.

The application of these rules to the facts in the case at bar is decisive of the case in favor of the plaintiff. The principal (Pullen) is the witness who testified to the agreement. His testimony on this point is, in brief, that a short time after the note was due he saw the plaintiff, when the plaintiff told the witness that the note was due and wanted to know what he wanted to do about it. Witness answered, "I told him I hadn't the money. He told me that if I would give him eight per cent. I might have that money. Said he, you can have it as long as you want it. I told him I would do it."

The intention of the parties, as shown by this testimony, is that from that time forward, so long as Pullen kept the money, he should pay eight per cent. interest. If the agreement had been reduced to writing and signed it would have been a valid contract and one which could be enforced; and as the parties then would have substituted another contract for the original, without the knowledge or consent of the defendant, he would have been discharged. But the contract not being binding, the rights of the parties were in nowise changed and the surety would not be thereby discharged. The verdict being against law must be set aside.

Verdict set aside.

Appleton, C. J., Danforth, Peters and Libbey, JJ., concurred.

RED RIVER NATIONAL BANK *v.* ERMINA C. BRAY ET AL.

105 *Tex.* 312, 148 *S. W.* 290 (1912).

Mr. Justice Phillips delivered the opinion of the court.

On April 11, 1907, E. F. Bray and Erminia C. Bray, his wife, executed and delivered to the Red River National Bank of Clarksville, Texas, their two promissory notes, payable to the bank, aggregating $4,133.30, principal, the first maturing October 15, 1907, and the other December 15, 1907, to secure the payment of which they at the same time granted a deed of trust lien upon certain real estate, situated in Clarksville, the separate property of Mrs. Bray. Neither of the notes was paid at maturity, but between October 15. 1907, the date of the maturity of the first note, and July 7, 1908, payments amounting to $1,500.00 were made upon that note. Request was made by Bray for an extension of the maturity of both notes, and finally, on July 7, 1908, in consideration of the payment in advance of the interest that would accrue on them to October 1, 1908, the bank agreed with Bray to extend their time of payment to that date. Upon default then made in their payment the bank attempted to enforce its deed of trust by a sale of the property under the power afforded by its provisions. Thereupon Mrs. Bray, joined by her husband, brought this suit to enjoin such foreclosure proceedings upon the ground that the extension of the maturity of the notes was without her consent, whereby her property was released as security for the debts. The bank, among other things, answered that it had been induced to grant the extension by certain fraudulent and false representations made to it by Bray for the purpose of effecting the release of Mrs. Bray's property as security for the debt by duping it into an agreement for the extension. By cross-action it sought recovery for its debt and foreclosure of its lien. Judgment in the trial court resulted, through a peremptory instruction, in favor of Mrs. Bray, canceling the deed of trust lien, and denying to the bank recovery upon its notes because of bankruptcy proceedings instituted by Bray and then pending. The Court of Civil Appeals has affirmed that judgment, holding in its opinion that there was no evidence that Mrs. Bray consented to the extension. It further finds that there was evidence sufficient to raise the issue that the bank was deceived into agreeing to the extension by a fraud practiced upon it by Bray, as was alleged by the bank, but holds that the operation of the agreement to extend, notwithstanding the practice of a fraud in its procurement, was not otherwise than to work a release of the wife's property as security, inasmuch as an agreement so induced was not void in the sense that

a stranger would be entitled to disregard it, but at most was merely voidable at the instance of the bank as between itself and Bray.

The established rule of law is that if, without the consent of the surety, a binding agreement is made between the creditor and the principal debtor for an extension of the maturity of the debt, the surety is released; and the effect is the same as to property that stands in the relation of a surety, as did the property of Mrs. Bray in this case. The reason of the rule demonstrates its justness as a principle as well as its necessity in the business affairs of the people, for at any time after the maturity of the debt the surety, for his own protection, should possess the right to pay it and proceed against the principal for indemnity, and such right is impaired if the creditor enter into a valid contract with the principal for an extension of the time of payment. The law therefore visits upon the creditor the deserved consequence of his so impairing the right of the surety by releasing the surety from liability. Benson v. Phipps, 87 Tex. 578, 47 Am. St. 128. The true test in every such case accordingly is whether the agreement of extension is such as to deny to the surety the exercise of this right, which inheres in his relationship and which the law places at his disposal and command as a benefit and protection immediately upon the maturity of the debt. If the agreement of extension be a binding one, its effect clearly is to deprive him of his right. But if the agreement be not a binding one, it remains intact and unprejudiced. What the law speaks of in this sense as "a binding agreement" is an agreement that is conclusive upon both the creditor and the principal; an agreement that both effectually stays the hand of the creditor, and yields to the principal the full benefit of the indulgence; an agreement that neither can avoid, but which both must respect; and which, because of its inviolable character, operates to the harm of the surety. It does not mean an agreement that the principal has induced by his deceit and fraud, and is therefore wanting in that integrity which the law demands in contracts that it will enforce. It does not mean an agreement which is the result of the principal's artifice, bearing the semblance of a crafty trick and actuated by a dishonest design, under which the creditor is beguiled into a position where his forbearance, thus influenced, is turned against him, and is availed of to destroy the security for his debt. The law will not so protect the fruits of the fraud of the principal, or so penalize the magnanimity of the creditor. Such an agreement is not binding upon the creditor. If it is not binding upon the creditor, it is not such an agreement as will operate to the disadvantage of the surety or the prejudice of his rights. If the creditor should elect to stand upon it after notice of the fraud and request made by the surety that he proceed against the principal, the surety would be released under arts. 3811 and 3812 of the Revised Statutes, the first of which provides that when the right of

action has accrued upon the obligation, the surety may require by notice in writing, that the creditor forthwith institute suit upon it; and the other providing that in the event he fails to do so, as therein provided, after such notice, the surety shall be discharged. If the agreement is brought about by the fraud of the principal and is, therefore, not binding upon the creditor, no valid extension of the maturity results, the right of action would be regarded as having accrued upon the original maturity; and the statute would be available to the surety. Nor would such an agreement foreclose the right of the surety for his own protection to pay the debt and proceed himself against the principal for indemnity. Such right of action would be as complete in the surety as in the creditor, as the principles of subrogation would cast upon him all the rights and remedies of the creditor, including the defenses of fraud and deceit. Brandt on Suretyship, §§ 298 and 322. As such an agreement would not impair the right of the surety, no reason can exist why it should destroy the security of the creditor.

The Court of Civil Appeals, as stated in its opinion, recognizes that if this were a contract merely between the bank and Bray, the bank would be entitled to be heard upon its plea, and that as between them the agreement was subject to be avoided by the court because of the fraud alleged to have been perpetrated by Bray in its procurement. If it was thus subject to be set aside as between the bank and Bray, it was not a binding agreement between them, and can not be held operative to release the surety. The surety can not invoke for his release an agreement by which the creditor is not bound, regardless of whether it is binding upon the principal. It is only an agreement for a new maturity which is binding upon the creditor and prevents enforcement of the principal's liability that impairs the surety's right. If the creditor is not bound by the agreement and the principal's liability may still be enforced, what possible ground of complaint can the surety have, and how is he in any wise prejudiced? It is not necessary that the agreement of extension be void and not merely voidable, as is held by the learned judge writing the opinion of the Court of Civil Appeals. The effect of a judgment in favor of the bank upon the issue would be to make the agreement void ab initio and of no effect whatever. This court held in Benson v. Phipps, supra, in discussing the right of a surety under an extension agreement, that "if the creditor is not bound by the promise to extend, it is clear there is no release," which we deem the correct rule.

If the fraud of the principal is sufficient to absolve the creditor from an agreement induced by it, as between himself and the principal, it ought to be sufficient, and we think it is, to prevent the surety from profiting by it to the destruction of the creditor's security. In the well considered opinion of Judge Key, in the case of Officer v. Marshall, 9 Texas Civ. App. 428, 29 S. W. 246, where

the sureties claimed to have been released by an acceptance by the creditors of a renewal note to which the signatures of the sureties were forged, it is said: "When one is induced to enter into a contract by fraud practiced by the other party thereto, the contract is not binding upon the person defrauded, although the latter may have received a consideration. It follows, therefore, that if appellants accepted another note in payment of the one sued on, with appellees' names forged thereto, and they believed appellees' signatures to be genuine, the conduct of Marshall in presenting the forged note, and thereby procuring the note sued on, and an extension of time on the debt, was a fraud upon appellants, and, although he may have paid interest in advance, or some other valuable consideration, the agreement to extend the time was not binding upon appellants." Numerous other holdings are to the same effect. The principle announced in that case should control this one. As the Court of Civil Appeals has found that the evidence in the case was sufficient to raise the issue of fraud in the procurement of the bank's promise to extend the time of payment, it follows that its judgment and the judgment of the District Court should be reversed and the cause remanded to the District Court for the trial of the issue, and it is so ordered.

Reversed and remanded.

See also Corydon Deposit Bank v. McClure, 140 Ky. 149, 130 S. W. 971, Ann. Cas. 1912B, 484n.

SAMUEL K. TURNBULL *v.* WILLIAM BROCK

31 *Ohio St.* 649 (1877).

The plaintiff in error brought an action against Elijah S. Carr, D. S. Horney, and the defendant in error, Brock, in the court of common pleas, upon a promissory note executed by said defendants July 13, 1876, and given for the payment of $1,829, at five months and ten days from its date. Brock alleged by his answer that he was surety only on the note for Carr and Horney, who were principal makers; that when the note became due, the plaintiff in consideration of the payment of $200, then made to him by Carr and Horney to apply on the amount due, agreed to extend the time for the payment of balance until the 10th day of the month then next, and that this agreement for such extension was made without his knowledge or assent. This agreement was denied by the reply. Carr and Horney were in default. A trial was had on the issue thus joined, and resulted in a verdict and judgment for the plaintiff against Brock. On error the district court reversed the judgment for an alleged erroneous instruction to the jury, not necessary

here to notice. The agreement set up in the answer seems to have been treated in both courts below as valid, if established.

By the court. There is manifest error in the judgment of the district court. It is immaterial whether there was error in the instructions given to the jury in the court of common pleas or not. The plaintiff was entitled to judgment on the pleadings. Code, p. 384. A promise not supported by a consideration creates no legal obligation; and hence its nonperformance creates no legal liability. Part payment of a promissory note or debt, already due, is not a sufficient consideration for an agreement to extend the time for the payment of the balance. The makers of the note were under a legal obligation to pay the whole amount, which necessarily included every part, and the plaintiff, in receiving a part, obtained only what and indeed less than he was entitled to. No benefit, profit, or advantage, in a legal sense, resulted to the plaintiff, nor any detriment or loss to the defendant. The promise alleged, in point of legal obligation, was in no wise different than if it had been a mere naked agreement to extend the time for the payment of the entire amount due.

Motion granted. Judgment of the district court reversed, and that of the common pleas affirmed.

Accord: Stroud v. Thomas, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. 111; Halliday v. Hart, 30 N. Y. 474.

Payment of interest in advance is good consideration for an agreement to extend the time. Prussing v. Lancaster, 234 Ill. 462, 84 N. E. 1062; Kaler v. Hise, 79 Ind. 301.

Payment of interest in advance is not as a matter of law evidence of an agreement to extend the time. New York Life Ins. Co. v. Casey, 178 N. Y. 381, 70 N. E. 916; Agricultural Bank v. Bishop, 72 Mass. 317; Haydenville Savings Bank v. Parsons, 138 Mass. 53; Mariner's Bank v. Abbott, 28 Maine 280.

Payment of interest in advance is prima facie evidence of an agreement to extend the time. English v. Landon, 181 Ill. 614, 54 N. E. 911; Revell v. Thrash, 132 N. Car. 803, 44 S. E. 596; Osborn v. Low, 40 Ohio St. 347; Lawrence v. Thom, 9 Wyo. 414, 64 Pac. 339; People's Bank v. ~~Pearsons, 30~~ Vt. 711.

Payment of interest in advance is conclusive evidence of an agreement to extend the time. Gardner v. Gardner, 23 S. Car. 588; Hubbard v. Ogden, 22 Kans. 363; Preston v. Henning, 69 Ky. 556; Jarvis v. Hyatt, 43 Ind. 163

LEWIS D. TURRILL *v.* B. & H. BOYNTON AND H. C. & N. B. FLANAGAN

23 *Vt.* 142 (1851).

Assumpsit upon a promissory note for $400,000, dated March 20, 1847, payable to the plaintiff, on demand, and signed by the defendants, and by Jedidiah Boynton. Plea, the general issue, and trial by jury, March term, 1850—BENNETT, J., presiding.

On trial, the plaintiff gave in evidence the note declared upon. The defendants H. C. & N. B. Flanagan claimed that they were but sureties upon the note, and that they had been released from their liability by the act of the plaintiff—and the defendants gave evidence tending to prove that, previous to the execution of this note, the plaintiff had lent about $600.00 to Boynton & Burritt, on a usurious contract, all of which had been paid, except about $160, for which the plaintiff held the note of Boynton & Burritt, which included about $65.00 usurious interest upon the original note; that the plaintiff assigned that note, for $163.00, to the defendants B. & H. Boynton, and let them have other money, sufficient to make up the sum for which the note in suit was given, and they procured the other defendants to sign this note, as sureties merely—which was known to the plaintiff; that Boynton & Burritt, to secure their note for $160.00 to B. & H. Boynton, delivered to them sundry notes, against third persons, which B. & H. Boynton held, until the agreement hereafter stated; that in July, 1848, the plaintiff, the defendant Henry Boynton, and Noble Boynton and Burritt, of the firm of Boynton & Burritt, met together—and Noble Boynton claimed that the plaintiff should repay to his firm the $65.00 extra interest above mentioned—and Henry Boynton, for B. & H. Boynton, the principals on the note in suit, wished the plaintiff to suspend collecting this note; that it was then finally agreed between the three that B. & H. Boynton should pay to Boynton & Burritt the said sum of $65.00, extra interest, by indorsing that amount upon the $169.00 note, and should surrender to Boynton & Burritt that amount of the demands turned out by them to secure the $169.00 note, and should pay to the plaintiff one dollar, and the plaintiff should extend the time of payment of the note in suit for one year, or until the estate of Jedidiah Boynton, who had deceased, should be settled; and that B. & H. Boynton did accordingly then pay to the plaintiff one dollar, and Boynton & Burritt, by a parol agreement, then discharged the plaintiff from all liability to them for said usurious interest, and surrendered to Boynton & Burritt the same amount of usurious interest, and surrendered to Boynton & Burritt the same amount of notes, previously pledged by them to secure the $169.00 note. There was no evidence that the defendants H. C. & N. B. Flanagan had any knowledge of this agreement, or in any way consented to it. It appeared that Jedidiah Boynton's estate had not been settled at the time of trial.

The court held that as the note in suit was overdue at the time the agreement for forbearance was made, as claimed by the defendants, there was no evidence tending to prove such an agreement as would discharge the sureties—and directed the jury to return a verdict for the plaintiff for the amount due upon the note. Exceptions by defendants.

The opinion of the court was delivered by

Kellogg, J.: 1. The first question presented by the bill of exceptions is whether the agreement made by the plaintiff and the principals to the note, to extend the payment of the same, supposing it a valid agreement, founded upon sufficient considerations, does in law discharge the sureties—the agreement being made without the knowledge and consent of the sureties, and the note being at the time overdue.

That such an agreement, if made before the note comes to maturity, is sufficient to discharge the sureties, it is believed all the authorities agree. We find it laid down in the elementary works and in many reported cases, in general terms and without any qualification as to whether the note is due or not, that an agreement, founded upon sufficient consideration, and entered into between the payee and principal, without the assent of the surety, extending the time of payment beyond the time limited by the original contract, does, in law, operate as a discharge and release of the surety. Some of the cases, however, seem to attach some importance to the question of whether the agreement for delay is made before the contract falls due, and appear to countenance the idea that there is a distinction between such agreements made before and those made after the contract becomes due. While in the former they regard its effect to be a discharge of the surety, in the latter they hold it to be inoperative, at least not a release of the surety.

There are, however, numerous authorities, of the highest respectability, where no such distinction is taken or even suggested, which we can hardly suppose would have escaped the observation of courts and counsel, if such a distinction were well founded. Nor can we discover any sound principle upon which the distinction can be maintained. It is, indeed, said that where the agreement for delay is made after the note becomes due, it does not suspend the creditor's right of action; and that consequently the agreement does not operate to the prejudice of the surety. This is assuming that the agreement is inoperative for all the purposes for which it was made. Without stopping to discuss the question whether such an agreement can be pleaded as a temporary bar to a suit brought in violation of it (which we are inclined to think may well be done), can it be doubted that, upon proper application to a court of chancery, the suit would be enjoined? That such would be the result we apprehend there can be no doubt. If we are right in this conclusion, it is equally prejudicial to the surety, whether the extension of payment be given upon an agreement made before or after the note comes to maturity.

2. The second question raised by the exceptions involves an inquiry as to the validity of the agreement, by force of which the sureties claim that they are released from their liability upon the

note. It is said that the agreement is void for want of sufficient consideration—that the consideration for the promise of forbearance by the plaintiff is usurious, and that such consideration is insufficient to uphold the promise.

We do not see but the consideration must be conceded to be usurious. It is true that the payment of the sixty-five dollars was to Boynton & Burritt, who are not parties to the note in suit; but the payment was by the procurement of the plaintiff, for his benefit, and to discharge his liability to them; and the only consideration for this payment was the promise of the plaintiff to give further time for the payment of the note in suit. It was therefore the same as a payment of the sixty-five dollars to the plaintiff. The payment of one dollar to the plaintiff at the time the agreement was made was of the same character and for the same object—to obtain an extension of time for paying the note of four hundred dollars. Does this render the agreement invalid?

Upon this point it must be admitted that the adjudged cases are somewhat conflicting. The recent cases in New York hold such contracts void, not only while they remain executory, but after they are executed. Such is the doctrine laid down in Vilas et al. v. Jones et al., 1 Comst. 286. It seems that the same has been held in Kentucky, 1 B. Mon., to this extent, that a promise to pay usury was void, and therefore was no consideration for a promise of the creditor to forbear, and that the surety was not by such agreement released. In a subsequent case, in the same volume, the same court held that where the usury was paid at the time the creditor promised to forbear, it discharged the surety. Kenningham v. Bedford, 1 B. Mon. 325. It would seem, from the cases above referred to, that in Kentucky the law is settled thus—while the contract is executory, it is void and does not discharge the surety; but when executed by the debtor, by payment of the usury at the time of the promise to forbear, it is binding on the creditor and discharges the surety, and is like the case of Austin v. Dorwin, 21 Vt. 38.

The cases of Oxford Bank v. Lewis, 8 Pick. 458, and Blackstone Bank v. Hill, 10 Pick. 129, can have no bearing upon the question; for it does not appear in either of the cases that there was any promise by the creditor to forbear. The court held that mere delay to collect the note when due did not discharge the surety, and that the payment of the interest in advance, and beyond the time limited in the note for payment, was not evidence of an agreement to forbear. To the same effect is the case of Freeman's Bank v. Rollins, 1 Shepl. 208. It is an adoption of the law, as laid down in the above cases in Pick. The court, however, say in the last case that they do not intend to overrule the case of Kennebeck Bank v. Ruckerman, in which they say, "there was a direct affirmative agreement to give further credit;" and in which case,

I infer, that they held the surety was discharged. The case of Reynolds v. Ward, 5 Wend., is cited to show that a promise to pay interest upon the demand during the time of forbearance is no sufficient consideration for an agreement to forbear. The converse of this, however, is held in Bailey v. Adams, 10 N. H. 162.

In Grafton Bank v. Woodward, 5 N. H. 99, and Wheat v. Kendall, 6 N. H. 594, it is expressly held that the payment of usurious interest is a sufficient consideration to sustain a promise to forbear or give further credit; and that an agreement for forbearance for a specified time, founded upon such consideration, and entered into by the creditor without the consent of the surety, is binding upon the creditor and operates as a discharge of the surety. The same doctrine is held in Austin v. Dorwin, 21 Vt. 38, and the New Hampshire cases are there cited with approbation.

It is to be borne in mind that the agreement in the case at bar, so far as the interest of the plaintiff was concerned, was fully executed by the defendants B. & H. Boynton at the time the agreement was made. The one dollar was paid to and accepted by the plaintiff, and, upon the principals undertaking to pay the sixty-five dollars to Boynton & Burritt, the latter then discharged the plaintiff of all liability by reason of his having before received that amount, as usurious interest of Boynton & Burritt. And although the sixty-five dollars was not indorsed upon the note which B. & H. Boynton held against Boynton & Burritt until some short time after the agreement was made, yet we do not see that this circumstance can affect the liability of the plaintiff, for the sixty-five dollars was made available to him by the discharge of Boynton & Burritt. Nor do we see how B. & H. Boynton could avoid performing their undertaking to Boynton & Burritt. The latter had a just and legal claim against the plaintiff, which they were induced to release upon the promise of payment of the amount by B. & H. Boynton. They had relied upon that promise, and the defendants could not have avoided performing it had they been disposed.

It is said that the authority of Austin v. Dorwin is somewhat impaired by the fact that the case of Miller v. McCan, 7 Paige 451; Vilas v. Jones, 10 Paige 76, which are supposed in some measure to have influenced the decision, have since been overruled by the Court of Appeals in New York. 1 Comst. 274. How much influence those cases had upon the decision in Austin v. Dorwin it is impossible to say. Those cases, as also the case in Comstock overruling them, were decided by able courts, for whom we entertain the highest respect. It is not to be denied that the question is one of some difficulty, and upon which eminent jurists have differed in opinion. The case in Comstock is elaborately discussed and with great ability. The ground upon which the cases proceed, that hold agreements for extending the time of payment, founded on an usurious consideration, to be invalid is that such contracts

are void; and stress is laid upon the fact that the statute declares them void—that while the contract remains executory, the creditor can not enforce it—and if it is executed by the debtor, by payment of the usurious consideration, he can recover it back; and so the creditor in no event can derive any benefit from the contract; and consequently that he ought not to be bound by it. Such is the reasoning of the court in the case cited from Comstock.

It is said that this provision of the law, which enables debtors who have paid usurious interest to recover it back, is for the benefit and protection of debtors. But certainly the debtor is not bound to avail himself of this privilege. He may waive or release it. In this case, certainly none but the defendants can recover back the usurious interest which was paid, and if they do not see fit to avail themselves of that privilege, but by their acts and conduct place it beyond their power to recall the payment thus made, is it the right of the creditor, after having received and appropriated to his use the consideration of the contract, to repudiate it? We think not. The defendants B. & H. Boynton can not recover of Boynton & Burritt the amount paid; for, so far as they were concerned, the contract was not tainted with usury. If, then, the defendants can recover it at all, it must be from the plaintiff. But do not the defendants, by causing the agreement to be set up and established as a defense to this suit, deprive themselves of the right to recover back the consideration upon which the agreement was founded? Under such circumstances, it seems to us that the defendants would be estopped from claiming the usurious interest which was paid as consideration for the agreement to delay payment of the note.

But, however that may be, we think the question of the sufficiency of the consideration, upon which this agreement rests, was virtually decided in Austin v. Dorwin, and we are not disposed to depart from the doctrine of that case.

The judgment of the county court is reversed and new trial granted.

Accord: Osborn v. Low, 40 Ohio St. 347; Fleming v. Barden, 126 N. Car. 450, 36 S. E. 17, 53 L. R. A. 316, 78 Am. St. 671; Glenn v. Morgan, 23 W. Va. 467; Niblack v. Champeny, 10 S. Dak. 165, 72 N. W. 402.

Contra: Farmers & Traders' Bank v. Harrison, 57 Mo. 503.

MILLER v. STEM

2 *Pa. St.* 286 (1845).

SERGEANT, J.: * * * But the main point of the case is whether sufficient was proved to authorize the court to leave it to the jury to say that the plaintiff made an agreement to give time, and which had the effect to discharge the defendant. The principle of law, as settled by the recent authorities is, that if the creditor make an express agreement with the principal, upon sufficient consideration, or on taking a new security, to give a further time for payment, the surety is thereby discharged. But mere consent to forbear, for a loose and uncertain period, does not tie up the creditor's hands, and an agreement, without a sufficient consideration, is nudam pactum; Chitty on Bills, 412-414; 3 Penna. Rep. 440. The evidence in the case before us is defective in these essential particulars. Boas, the chief witness, who speaks to the point, says he does not remember what length of time it was for; he expected the Northampton Bank would be good in July; he told the plaintiff, if so, he could pay him almost any time then; the plaintiff was to wait till some time in the summer. This is not only vague as to proving an express agreement by the plaintiff to wait, but the time was indefinite and uncertain. To take away from the plaintiff a just debt, in order to relieve a surety, justice requires there should be a clear, distinct agreement by the creditor, placed beyond reasonable doubt for a time certain, or total forbearance, or forbearance for a reasonable time.

Judgment reversed, and venire facias de novo awarded.

JACOB SMITH v. ESTATE OF ELIZUR STEELE

25 *Vt.* 427, 60 *Am. Dec.* 276 (1853).

The case shows that there was sufficient property placed in the hands of the intestate, by the principal, to pay, and for the purpose of paying, the note in question. The surety holds this prop-

[2] Statement of case and part of opinion omitted.

Accord: Ward v. Wick, 17 Ohio St. 159; Clark v. Gerstley, 204 U. S. 504, 51 L. ed. 589; Thompson v. Robinson, 34 Ark. 44; Jarvis v. Hyatt, 43 Ind. 163.

For the effect of an extension of time by the execution and delivery of a note for the debt, payable at a later date, see § 85, Stearns on Suretyship, 2nd ed.

erty in trust for the benefit of the plaintiff, as well as for himself, and for its misapplication he is responsible to the plaintiff.

Redfield, Ch. J.: The only question made in the present case is how far a surety, who has ample collateral security from the principal, is precluded from taking advantage of any enlargement of the time of payment, by arrangement between the creditor and the principal, this property having subsequently, by consent of the principal, gone to pay other of his debts.

This case states that the first contract for the enlargement of time was made in January, 1843, the note falling due in April following, which was for one year, and that this agreement was renewed from time to time, until the decease of defendant, Steele, in August, 1847. * * *

Upon general principles, it seems to us, that so long as the surety was fully secured by property in his hands, he should be estopped from objecting to any enlargement of the time of payment, made by arrangement between the creditor and principal. If this fact is known to the creditor, it would certainly place his conduct in a very different light from what it is when no such indemnity exists. We can all see that in such a case there can probably be no fraud in fact. And in equity (and in law, we think the rule should be the same), there is no fraud if such indemnity exists, whether known to the creditor or not. And this ground of defense for the surety goes upon the supposed basis of fraud. 1 Story Eq. 327. In such a case the surety is the virtual principal, and ought to be bound by every enlargement of the time of payment quite as much, perhaps more, than are joint principals, by such a contract made by one of their number, and the creditors, of which there is no doubt.

A surety who is fully indemnified, by property in his possession, which, by the terms of the assignment, he is at liberty to convert at once into money, as in the present case, stands much in the same light as a surety who has received the amount of the debt in money from his principal. And in such case he is clearly the principal. And so, if he had received half the money, he would become a coprincipal; and in all these cases, as it seems to us, on general principles, he should not be permitted to claim the privileges of a strict surety, without indemnity. * * *

And to the extent of contract of enlargement, made while the surety had ample indemnity of the kind shown here, there can be no doubt he would be estopped from setting up this defense. And as he had such security, when the first contract of enlargement of time of payment was made, and nothing appears but such was the fact, at the subsequent times of such enlargement, the case must be opened upon this point alone, and go back to ascertain the facts in regard to this subject.

How far the surety, after having such property assigned to pay

the debt, or indemnify him against signing the note, could place himself in the same situation he was before, is a point of some difficulty.

Judgment reversed and case remanded.

Accord: Chilton v. Robbins, 4 Ala. 223, 37 Am. Dec. 741; Kleinhaus v. Generous, 25 Ohio St. 667; Turner v. Stewart, 51 W. Va. 493, 41 S. E. 924.

J. Y. DEAN *v.* W. H. RICE ET AL.

63 *Kans.* 691, 66 *Pac.* 992 (1901).

The opinion of the court was delivered by

JOHNSTON, J.: In an action brought by J. Y. Dean to recover on a promissory note originally executed by W. H. Rice, James Turner, and C. L. Rice, the defense was made by ~~C. L. Rice~~ that he had signed the paper as surety, and had been released by an extension of time granted without his knowledge or consent. At a public sale of the property of Dean, held on February 9, 1886, W. H. Rice bought some cattle on credit and gave a note for $306, payable nine months afterward, with interest from date at twelve per cent. per annum, and James Turner and C. L. Rice signed the note with him as sureties. About December 1, 1890, the note being not paid, Dean obtained from W. H. Rice and James Turner a renewal note, payable two years from that time, with interest at ten per cent. per annum from date. C. L. Rice, who had been absent from the state for several years, did not sign the renewal note nor consent to the extension of time thereby granted to the other parties, but the testimony is that at that time Dean reserved his rights against C. L. Rice, the surety. In this action to recover the debt, judgment was rendered against W. H. Rice and James Turner without consent, but the court held that C. L. Rice was not liable on the obligation because the creditor, Dean, had granted the principal on the note an extension of time without the consent of the surety.

Dean first alleges that error was committed in admitting testimony to the effect that C. L. Rice had signed this note as surety, when it had not been shown that Dean knew when he accepted the renewal note that Rice had signed in that capacity. The point is without merit, one reason being that testimony was given tending to show that Dean was asked on the day of the public sale to accept Turner and C. L. Rice as sureties, and that he had accepted them in that relation. As a general rule an agreement between the creditor and the principal for an extension of time to the principal in which to pay the debt, without the knowledge or consent of the surety, will operate as a release of the surety. (Roberson v. Blevins, 57 Kan. 50, 45 Pac. 63.) An important exception to

the rule is that if the creditor, at the time of the extension, reserves its remedies against the surety, the latter will not be discharged from liability.

The principal reason for the release of sureties in such cases is that the postponement of payment varies the contract relation and deprives the surety of the right to pay the debt when it becomes due and to have immediate recourse on the principal. When a creditor ties his own hands and grants an indulgence which prevents a surety from obtaining that indemnity against a principal which the law gives him, the surety is necessarily prejudiced and should be released. If, however, a creditor explicitly reserves all remedies against the surety, it rebuts the presumption of a purpose to release the surety, and, in effect, it is an agreement between creditor and principal that the creditor may sue the surety, who in turn may then proceed against the principal. If the surety is not deprived of the protection and indemnity which the law affords him against a principal he is not prejudiced and is not entitled to be released from the obligation which he has undertaken. (2 Rand. Com. Pap. § 970; 2 Dan. Neg. Inst. § 1322; Tied. Com. Pap. § 424, p. 706; 2 Brandt Sur. § 376; 24 A. & E. Encyl. of L. 830.)

As the proof in the case all shows that the remedies against the surety were expressly reserved by the creditor, there was error in releasing the surety from liability.

The judgment of the district court will be reversed and the cause remanded for further proceedings.

Doster, C. J., Smith, Ellis, JJ., concurring.

See also Morgan v. Smith, 70 N. Y. 537; Sohier v. Loring, 6 Cush. (Mass.) 537; Boultbee v. Stubbs, 18 Ves. 20; Ex parte Glendinning, 1 Buck 517.

By virtue of the Negotiable Instrument Code the defense of extension of time is no longer available to persons primarily liable upon such instruments. Richards v. Market Exchange Bank Co., 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99n; Vanderford v. Farmers &c. Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129n; Wolstenholme v. Smith, 34 Utah 300, 97 Pac. 329.

Otherwise as to persons secondarily liable upon such instruments unless the right of recourse is expressly reserved. Northern State Bank v. Bellamy, 19 N. Dak. 509, 125 N. W. 888, 31 L. R. A. (N. S.) 149n; Morehead v. Citizens' Deposit Bank, 130 Ky. 414, 113 S. W. 501, 23 L. R. A. (N. S.) 141n.

SECTION 5. DELAY OF CREDITOR IN ENFORCING CONTRACT AGAINST PRINCIPAL

JOHN D. PIPKIN *v.* HENRY BOND

40 *N. Car.* 91 (1847).

Cause removed from the Court of Equity of Chowan County, at the spring term, 1847, by consent of parties.

William McNider was indebted to the defendant in the sum of $932.80, and to secure it he gave a bond and procured the plaintiff, Pipkin, to join in it, as his surety. After the bond had been some time due, Pipkin, understanding that McNider was somewhat embarrassed, informed the defendant of it, and requested him to put the bond in suit, and collect the debt. The defendant accordingly brought a suit against McNider and Pipkin in the County Court of Chowan, where McNider lived; and after the suit had been put at issue and stood for trial at the next succeeding term, the defendant, at the instance of McNider, agreed to dismiss it, and at the next term he did dismiss it at the costs of the defendant in the action. About eighteen months afterward the defendant brought another action of debt on the bond, and recovered judgment; and, McNider having become insolvent, the present bill was brought by Pipkin to restrain the creditor from raising the money from him.

The bill states that at the time the first suit was brought McNider, though embarrassed, had considerable property, and that, if the suit had been duly prosecuted and judgment obtained according to the course of the court, the money could have been raised out of McNider's property.

It further states that the suit was dismissed (as he, the plaintiff, afterwards learned from McNider) upon an agreement between the defendant and McNider, for further indulgence on the debt for a year, or some other specified time, in consideration of the sum of $100, paid by McNider to Bond, or secured by a note of McNider to Bond. And that this agreement for indulgence and dismissing the suit was entered into by Bond and McNider without the plaintiff's consent or knowledge; and that he supposed, from hearing nothing to the contrary, that the judgment had been duly taken, and the debt collected from McNider, and that he had no suspicion that such was not the case until the writ was served on him in the second action.

The bill insists that the defendant discharged the plaintiff, as

surety, by entering into the new arrangement with the principal debtor; and it prays for a discovery of the several facts stated and a perpetual injunction. * * *[1]

RUFFIN, C. J.: The law affecting this controversy has been so often discussed in modern times that it has come to be well understood, we believe. A creditor is not bound to a surety for active diligence against the principal; for it is the contract of the surety that the principal shall pay the debt, and it is his business to see that he does. Therefore, forbearance merely, the omission to sue, or, after suit, to take judgment, or to sue out execution, although it may be from the wish not to distress the principal, and the consequence of communications from him, and although the creditor may not inform the surety of the principal's want of punctuality, will not discharge the surety. The reason is, as was just mentioned, that it is the duty of the surety to himself, and to the creditor, to look to those things himself—the ability and punctuality of his principal; and, if there is reason to doubt them, it is his own folly not to ascertain the fact, and request the creditor to press for payment, or, if the creditor does not choose (as he is not bound) to incur the trouble and expense of suing, then to pay the debt himself, and prosecute the claim in his own name, or in that of a trustee for him. But if the creditor parts from a security held by him, either for favor to the principal or from any other motive of bad faith to the surety, or without the privity of the surety, makes a contract with the debtor for forbearance, so that he can not rightfully sue him, and thus disables himself to receive payment from the surety, and transfer to him his securities at any moment, the surety may require it from him: in such cases he discharges the surety. For, while the creditor is not bound to diligence, he is bound not to increase the risk of the surety by any act of his; and if he does anything that has that effect, he can no longer look to the surety. Nisbet v. Smith, 2 Bro. C. C. 579; Rees v. Burrington, 2 Ves. Jr. 539; Samuel v. Howarth, 3 Meriv. 272; Bank of Ireland v. Beresford, 6 Dow. P. C. 233. To these might be added many American cases to the same purpose. Lord Eldon, in the cases, lays down the rule almost in so many words as it has been just stated. And in Nisbet v. Smith, where the creditor had, at the request of the surety, brought a suit against the principal, and dismissed it, and took a warrant of attorney to confess judgment with a stay of execution for three years, if the interest should be paid, Lord Thurlow said that it was contrary to the faith of the action, which had been brought to give credit to the principal beyond the term stipulated in the bond; and that, as the creditor had thought fit to compromise the action, under an

[1] Part of statement of case omitted.

idea that the surety would comply, the case was brought to the mere question whether the surety should be obliged to remain bound for the prolonged term: and he held that he should not. * * *[2]

KINDT'S APPEAL

102 *Pa.* 441 (1883).

This was an appeal by Esther Kindt from a decree of the Orphans' Court of Berks County, dismissing her exceptions to and confirming the report of an auditor appointed to distribute the estate of Christian L. Bechtel, deceased.

The facts, as found by the auditor (Jeremiah K. Grant, Esq.), were as follows: On April 6th, 1871, Christian L. Bechtel, the decedent, became a surety on a judgment bond for $2,000, given by Charles H. Miller to Michael Haak, with a warrant of attorney bearing even date therewith attached, upon which judgment was entered on the same day. At the time of said entry, Charles H. Miller had certain real estate of sufficient value to pay the judgment. Subsequent to said entry, Charles H. Miller and Elvira L., his wife, conveyed their respective interests in said estate to Christian L. Bechtel, who on the following day reconveyed it to Elvira L. Miller, in fee, which conveyances were duly recorded. On March 9th, 1876, the said judgment was revived at the instance of Michael Haak by an amicable sci. fa. against Charles H. Miller and Christian L. Bechtel, but no notice was given to Elvira L. Miller, the terre-tenant; whereby the judgment lost its lien and became uncollectible in respect to the estate conveyed as aforesaid (See Haak's Appeal, 4 Out. 59.)

On February 27th, 1879, Michael Haak assigned the judgment to Esther Kindt. Bechtel died in July, 1880, and on the audit of his estate Esther Kindt presented this judgment for payment. Counsel for the administrators objected to its allowance on the ground that the failure to properly revive the judgment was a discharge of the surety.

The auditor disallowed the claim, and the exceptions filed to his report on behalf of Esther Kindt were dismissed by the court (Sassaman, J.), and the report confirmed. The exceptant thereupon took this appeal, assigning for error the said action of the court.

Mr. Justice Green delivered the opinion of the court

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[2] Part of opinion of the court omitted.

Accord: Welch v. Walsh, 177 Mass. 555, 59 N. E. 440, 52 L. R. A. 782, 83 Am. St. 302; Yager v. Kentucky Title Co., 112 Ky. 932, 66 S. W. 1027; Crosby v. Woodbury, 37 Colo. 1, 89 Pac. 34.

When the Haak's judgment was revived against Miller and Bechtel in 1876, it was done by an amicable writ of scire facias and agreement to which Bechtel, the surety, was necessarily a party. He knew, therefore, that the judgment was not being revived against Mrs. Miller, his sister, terre-tenant then of the land which was bound by the judgment on the day it was entered. Moreover, he had himself received a conveyance of the land from Miller and wife on the same day the judgment was entered and immediately after reconveyed it to the wife, who continued to hold it thereafter. Bechtel therefore knew perfectly well when the judgment was revived that his sister, the terre-tenant, was not included in the revival, and that as to her the land was discharged of the lien of the judgment thenceforth. If he desired that the lien of the judgment should remain, it was his plain duty to notify the creditor to that effect, both for the creditor's protection and his own. He did not see proper to do so. Haak, the judgment creditor, might well be satisfied to revive his judgment in the same manner as it was originally taken. If he was content with the liability of Charles H. Miller and Bechtel he was perfectly at liberty to rest upon that, and might wait as long as he chose without putting in peril his right to collect the money from Bechtel. Mere supineness would not prejudice his right to resort to the surety, unless the latter notified him to proceed, of which there is no pretense. It would be strange indeed if, in such circumstances, an omission to revive against a subsequent alienee of the land should deprive the creditor of his right of recovery against the surety. It has been repeatedly held that even when the judgment creditor failed entirely to revive his judgment against the debtor and thereby lost its lien altogether against the land of the debtor, such omission was no defense to the surety. Thus in United States v. Simpson, 3 Penna. 437, it was held that where the judgment creditor suffered the lien of the judgment to expire, without revival, the surety was not discharged. Gibson, C. J., said, "the rule is well settled that mere forbearance, however prejudicial to the surety, will not discharge him. It is his peculiar business to judge of the danger to be apprehended from delay, and to quicken the creditor, where the occasion requires it, in the way known to the law; in default of which the loss incurred is necessarily to be attributed to his own supineness." In Mundorff v. Singer, 5 W. 172, it was held that if an obligee in a bond obtain a judgment against the principal and suffer it to remain without revival until the lien on his lands be lost, and afterwards sue the surety on the same bond, the latter can not avail himself of the negligence of the plaintiff as a defense. This principle has been followed in many cases, among which the latest is that of Winton v. Little, 13 Norr. 64, in which Mr. Justice Trunkey, on p. 73, says, "Mere forbearance, however prejudicial to the surety, will not discharge him. This rule applies where a creditor suffers a

judgment to lose its lien for want of revival against the principal debtor, and thereby subsequent creditors are enabled to take the land." The foregoing authorities and the principle which they declare and enforce were entirely overlooked by the auditor and court below and hence there was error in the conclusion at which they arrived. There was nothing but delay on the part of the judgment creditor. He made no contract by which he disabled himself from proceeding at any time. He revived his judgment against both the original defendants, and merely failed to revive it against the terre-tenant, who was a stranger to the original judgment. The surety gave no notice to the creditor to proceed, and it would be contrary to the well established law to hold that in such circumstances he was released from his liability. His obligation was kept continuously alive and, of course, his estate must discharge it.

The decree of the court below is reversed. * * *

JAMES M. DYE *v.* W. H. H. DYE.

21 *Ohio St.* 86, 8 *Am. Rep.* 40 (1871).

The judgment sought to be reversed by this proceeding was rendered in an action brought in the court of common pleas of Miami county by W. H. H. Dye (the defendant in error), against James M. Dye (the plaintiff in error), Thomas C. Dye, and Roswell S. Dye, on a joint and several promissory note for ten thousand dollars, dated December 12, 1864, and payable to W. H. H. Dye, in twelve months after date.

The material question in the case arose on the demurrer of the plaintiff below to the separate answer of James M. Dye to the petition. He alleges in his answer, as a defense to the action against him, that the note executed by him and the other defendants to W. H. H. Dye, on which the action is brought, was signed by him as surety only for Thomas C. and Roswell S. Dye, which fact was known to W. H. H. Dye, the payee of the note and plaintiff in the action; that, before the maturity of the note, Roswell S., one of the principals of the note, became insolvent; that on June 21, 1865, Thomas C. Dye, the other principal, failed, and made an assignment of all his property, for the benefit of his creditors, to O. Bowen and Roswell S. Dye, in the probate court of Marion county, according to law; that said assignee duly qualified; that they gave notice, as required by law, to the creditors of Thomas C. Dye (of whom W. H. H. Dye was one), to present their claims for allowance and payment; that the assignees realized out of the assets of Thomas C. Dye, after paying all special liens thereon, the sum of $167,323.04; that, after three partial settlements of said

assignment, a final settlement was made by the assignees, December 23, 1868, by which all claims against said Thomas C. presented to the assignees properly authenticated were paid in full; and that W. H. H. Dye, the plaintiff below, wholly neglected and refused to present his claim to the assignees, by reason of which the same was not paid. He insists that, therefore, he is discharged from his liability as surety thereon.

The common pleas sustained the demurrer to the answer and rendered judgment in favor of the plaintiff below for amount due on the note. Thereupon James M. Dye took the case to the district court, on error, where the judgment of the common pleas was affirmed.

To reverse these judgments, he now asks leave to file his petition in error in this court, on the ground that the courts below erred in sustaining the demurrer to the answer, thereby holding that the defense interposed by him was not sufficient in law to bar the action against him.

DAY, J.: The error alleged originated in the court of common pleas. The action in that court was on a promissory note. One of the defendants, who was surety on the note, interposed a defense, which raises the material question to be considered: will the mere neglect of the holder of a note to present it to the assignee of the principal discharge the surety to the extent that might have been thereby realized on it out of the assets of the principal?

No case upon this precise point has been brought to our attention; we are, therefore, left to determine it upon the principles that run through the cases on analogous questions.

The case before us is not embarrassed by considerations that arise in cases where the principal debtor is discharged by the negligence of the creditor, for the statute of this state in relation to assignments leaves the liability of the principal makers of the note unaffected by the neglect to present it for allowance and payment out of the assets in the hands of the assignees.

A creditor may, however, in many ways do that which, though it may not affect the liability of the principal, will exonerate sureties. In all such cases the discharge of the surety is based upon some recognized and well-defined principle, and, in general, results from a positive act of the creditor which operates to the prejudice of the surety. Passiveness on the part of the creditor will not discharge the surety, unless he omits to do, when required by the surety, what the law or his duty enjoins him to do, or unless he neglects, to the injury of the surety, to discharge his duty in any manner in which he occupies the position of a trustee for the surety. The Farmers' Bank of Canton v. Raynolds, 13 Ohio 84; Shroeppel v. Shaw, 3 Comst. 446; 1 Story Eq., § 325; and note to Rees v. Barrington, 3 Leading Cases in Equity 529, for a full reference to the authorities on the subject.

The discharge of the surety is not claimed, in this case, by reason of any positive act of the creditor, nor by reason of his neglect to prosecute the claim, after being required by the surety to do so by notice in writing, in accordance with the statute, nor, indeed, by reason of his neglect to comply with any requirement of the surety whatever, for, from aught that appears, the passiveness of the surety equaled that of the creditor. Nor did the creditor have anything in his hands, actually or constructively, in the nature of a trust. Then, upon the principles so broadly stated, it would seem that the surety was not exonerated from liability on the note.

But it is claimed that it was the duty of the creditor to present the note to the assignees, and thus save the surety harmless from debt, and that his neglect to do so was, consequently, a fraud on the surety. This claim of fraud, it will be seen, rests on the supposition that it was a duty the creditor owed to the surety, to present the note to the assignees in order to protect him from liability. What might have been his duty, if the surety had required him to present the note, we are not called upon to decide. But so long as the surety is willing to remain passive, why may not the creditor? He may be entirely willing to continue to rest upon the credit he had originally given to the surety, rather than take upon himself the trouble and expense of claiming a dividend out of the assets of the principal; for he may look to the surety as well as the principal for the payment of the debt. He gave credit to both equally, while the surety trusted the principal alone for his indemnity. So far as the interest of the creditor was concerned, it was a matter of indifference to him which of the makers of the note paid it; but it was directly for the interest of the surety that the note should be paid out of the assets of the principal. It would, therefore, seem most reasonable that he should be the primary party to move for the accomplishment of that object, for he who enjoys the benefit ought to sustain the burden. At least he might have requested the creditor to present the note to the assignees, and, if he refused to do so, I see no reason why he might not have done it himself, nor why, if the assignees had refused to allow it, he might not have enforced it by action, for the statute gives to the surety substantially every remedy that the creditor has, to enforce payment of a claim by the principal. The note became due within the time mentioned in the statute for the presentation of claims, and was overdue more than two months before the assignees were authorized by law to make a dividend, and more than two years before their final settlement. The surety was not at any time debarred from any of his legal remedies against the principal, or his assets in the hands of the assignees; and if, by possibility, they were not as ample as those of the creditor, he might at least have made them equally so, by discharging his own obligation to the creditor by payment of the note when it became due. At best, then, the

surety was not less in default than the creditor, and, therefore, can claim no equitable right against him. Indeed, if the surety had discharged his duty, by payment of the note when it became due, the creditor would have had no claim to present to the assignees of the principal; the surety's own default to the creditor, therefore, in fact becomes the ground of his claim against him. Since, then, the breach of duty charged against the creditor can not be sustained without giving the surety the advantage of his own default, I know of no principle on which his claim can be tolerated.

The case of McCullum v. Williams' Exs., 9 Vt. 143, is much relied on by the plaintiff in error. In that case the note was barred as against the estate of the principal by reason of the creditor's failure to present it to the administrator within the time limited by the law, and the creditor sought to charge the estate in equity through its liability to the surety on the note. Relief was refused in part, on the ground that good faith required the creditor to present his note to the administrator, and that, therefore, the negligence of the creditor, which discharged the principal, also discharged the surety. But that case is distinguishable from this, in that here the principal was not discharged, nor does it appear, as it did in that case, that the surety was out of the country and had no notice of the decease of the principal.

But so far as the ruling in that case has any application to this, the weight of the authority is against it. In Johnson v. The Planters' Bank, 4 Smedes & Marshall 165, it was held that the surety on a note was not discharged, although it was barred as against the estate of the principal, by reason of the omission of the holder of the note to present it to the administrator within the time limited. In that case, after stating the general rule, "that the obligation of the surety becomes extinct by the extinction of the obligation of the principal debtor," the court say: "An exception of this rule takes place whenever the extinction of the obligation of the principal arises from causes which originate in the law, and not in the voluntary act of the creditor, as in bankruptcy. Theo. on Principal and Surety, 67; Brown v. Carr, 7 Bing. 508. The creditor, in order to preserve his rights against the surety, is not bound to active diligence, and, if he merely remains passive, his rights are not impaired." (Theobold, p. 80.) * * * "The creditor would not often give the credit without security; he takes it for his own indemnity. The surety knows his own risk. If he desires to lessen that risk he may file a bill to compel the bringing of the suit, or, by payment, he may have an assignment of the instrument. But while both remain passive the operation of the law will not discharge the surety." * * *

"The sureties may, in such cases, compel the presentment of the claim in due time, and thus preserve their recourse against the estate beyond doubt. If they fail to do so they are in fault in neg-

lecting to protect their interest, and have no right to throw the consequences of their negligence upon the creditor."

To the same effect is the holding in Nashville Bank v. Campbell, 7 Yerger 353; Hooks & Wright v. Branch Bank of Mobile, 3 Ala. 580; Vanderburgh v. Snyder, 6 Iowa 39; and Silbey v. McAllaster, 8 N. H. 389.

In the last case cited, the chief justice, in delivering the opinion of the court, said: "It is well settled that a discharge of the principal, under a bankrupt law, does not discharge the surety. 6 Mass. 33; 4 M. & S. 334; 2 M. & S. 39; 4 J. B. Moore 153."

"And a creditor is under no obligation to prove his debt under a commission of bankruptcy of the principal, unless the surety gives to the creditor an indemnity for the expense. 4 John C. R. 132; 10 Vesey 414; 6 Vesey 734; 2 John. C. R. 562."

"The surety is the person who trusts the principal, and it is his business to see that the principal pays. * * * Such being the general rules of law, it is very apparent that if the principal die, and his estate be administered in the insolvent course, the creditor is under no obligation to present his claim to the commissioners, and procure what he may from that estate. He has a right in such case to look to the surety for the whole amount."

"It is the business of the surety to procure the creditor to lay his claim before the commissioners, or to pay the claim, and then lay his own claim before the commissioners for the money he may have paid to the creditor."

If then the mere omission of the creditor to present his claim to the assignee of the principal in bankruptcy, or to his administrator, where in either case the liability of the principal is discharged, will not exonerate the surety, much less will such neglect exonerate him in a case like the one before us, where the principal remains liable. The doctrine of the cases referred to is in harmony with that before stated in relation to the liabilities of sureties, and, on principle, would seem to be decisive of this case.

In McLemore v. Powell (12 Whea. 555) Judge Story says: "It was correctly said by Lord Elden, in English v. Darley (2 B. & P. 61), that as long as the holder is passive all his remedies remain; and, we may add, that he is not bound to active diligence."

This doctrine, as applied to sureties, has been carried in this state to the extent of holding that the loss of a judgment lien on the property of the principal, by reason of the omission of the creditor to enforce it, it will not release the surety. (Farmers' Bank of Canton v. Reynolds, 13 Ohio 84.)

We are not required to go to that extent, to hold that the mere omission of a holder of a note to present it to the assignee of the principal, will not exonerate the surety from liability thereon.

We are so well convinced that the rulings of the courts below

were correct that we are constrained to overrule the motion for leave to file a petition in error.

Scott, C. J., and Welch, White and McIlvaine, JJ., concurred.

WILLIAM VILLARS *v.* LEVIN T. PALMER, ADMR., ET AL.

67 Ill. 204 (1873).

This was a bill in chancery by William Villars against Levin T. Palmer, administrator of the estate of Guy Merrill, deceased, and John G. Leverich, to enjoin proceedings at law by Palmer as administrator of the estate of Merrill, for the use of Leverich, upon a promissory note, given by one George W. Taylor, as principal, and signed by the complainant as surety, and payable to said Guy Merrill as master in chancery. The bill showed that the estate of Taylor was solvent, and that the debt could have been made if the claim had been presented before it was barred by the two years' limitation. The court below dismissed the bill, and the complainant appealed.

Mr. Justice Sheldon delivered the opinion of the court:

The claim on the part of the surety in this case is, that, as by the neglect of the creditor to present his claim against the estate of Taylor, the principal, all remedy in respect to the debt has been lost against the estate of the principal, that should operate to discharge the surety.

The complaint is of mere delay, not of any affirmative act on the part of the creditor, whereby the surety has been affected. But it is the well established principle, that mere delay on the part of the creditor to proceed against the principal does not discharge the responsibility of the surety.

In cases of this sort, there is not any duty of active diligence incumbent on the creditor. All that the surety has the right to require of the creditor, in the absence of any statute provision, is, that no affirmative act shall be done that will operate to his prejudice. It is his business to see that the principal pays.

The law furnished the surety here with ample remedies for his protection. He might have paid the debt according to his undertaking, and have sued the principal himself; or he might have gone into a court of equity after the debt became due, and obtained a decree that the principal should pay it; or he might, under the statute, have given to the creditor written notice to put the note in suit, and thus have compelled him to sue the principal.

If he has seen fit to lie by, and the neglect to proceed against the principal in his lifetime, or against his estate after his decease,

has been the means of depriving the surety of his indemnity, he must abide by the loss, and can not throw it upon the creditor.

Without more, we need but to refer to the cases of The People v. White et al., 11 Ill. 342, and Taylor v. Beck, 13 id. 376, where the subject is fully considered and the authorities cited. In the former case, the very point made by the surety here is decided adversely to him.

Under the statute of March 4, 1869, Sess. Laws 1869, p. 305, where the principal maker of a joint note has departed this life, it is made the duty of the holder of the note to present the same against the estate of the decedent for allowance, to the proper court, within two years after the granting of the letters of administration. But that statute is too late to affect the present case.

The decree of the court below dismissing the bill is affirmed.

Decree affirmed.

Accord: Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. 235; Banks v. Ranstead, 62 Md. 88; Moore v. Gray, 26 Ohio St. 525; Johnson v. Planters' Bank, 12 Miss. 165; Yerxa v. Ruthruff, 19 N. Dak. 13, 120 N. W. 758, 25 L. R. A. (N. S.) 139n, Ann. Cas. 1912D, 809n.

Contra: Auchampaugh v. Schmidt, 70 Iowa 642, 27 N. W. 805, 59 Am. Rep. 459.

SECTION 6. FAILURE OF CREDITOR TO APPLY COLLATERAL

RILEY A. BRICK *v.* THE FREEHOLD NATIONAL BANKING COMPANY

37 N. J. L. 307 (1875).

Dalrimple, J., delivered the opinion of the court.

The defendant in this case is sued as indorser of a promissory note. The defense is, that the plaintiffs, the holders of the note, received from the maker a conveyance of certain property as collateral security for the payment of the note, and that because of their failure to sell the collaterals and appropriate the proceeds of the sale to the liquidation of the debt, coupled with the fact that the property held as collateral, had somewhat depreciated in value, between the time of the maturity of the note and the commencement of the suit, the right of action as against the defendant, who is an accommodation indorser, is lost. This proposition can not be maintained. It is well settled that mere delay by the creditor to sue the principal debtor will not discharge the surety, for the obvious reason that the surety may at any time discharge his obligation to the creditor, and thus make the principal his debtor. The

same rule holds when collaterals are pledged by the principal debtor. The surety may at any time after the debt becomes due and owing, discharge it and take the collaterals. The law implies no contract on the part of the creditor to proceed on the collaterals before he can sue the surety. Nor are the rights of the parties affected by the fact that the collaterals have depreciated between the time of the maturity of the debt, for payment of which they were pledged, and the commencement of the suit against the surety. These principals are recognized as sound law by the Court of Appeals of New York, in the well-considered case of Schroeppell v. Shaw, reported in 3 Comstock 446. The same case will be found reported in 5 Barb. 580.

But whatever may be the correct general rule on the subject, it is not shown in this case that the plaintiffs have been guilty of any neglect to the prejudice of the defendant. For aught that appears, the collaterals were, at the commencement of the suit, in as good condition, natural wear and tear excepted, as they were when the causes of action accrued. Besides it is fairly inferable from the evidence that the plaintiffs, after the note became due and before bringing suit thereon, made a reasonable effort to sell the collaterals.

Another and complete answer to the defense is, that by written stipulation the plaintiffs were bound, in case defendant was obliged to pay the note, to transfer the collaterals to him. In order to fulfil this stipulation, it was necessary for plaintiffs to retain the collaterals, if they could not be sold for a sufficient sum to pay the note in full, otherwise their right of action against the defendant would have been gone.

It is hardly necessary to add that the defendant's offer to pay the note prior to its maturity, on condition that the collaterals should be at once assigned to him, was of no effect, especially in view of the fact that the plaintiffs were under written stipulation, executed and delivered simultaneously with that given to the defendant, to convey the collaterals to the wife of one of the makers of the note, on payment of the note by him.

In the submission of the case by the court to the jury, no legal principle was violated. Substantial justice has been attained, and the rule to show cause should be discharged with costs.

The chief justice, and Justices Depue and Scudder concurred.

See also Cherry v. Miller, 75 Tenn. 305.

SECTION 7. FAILURE OF CREDITOR TO SUE AFTER NOTICE BY SURETY

PAIN *v.* PACKARD.

13 *Johns. (N. Y.)* 174, 7 *Am. Dec.* 369 (1816).

This was an action of assumpsit on a promissory note made by Packard & Munsion, in which Packard alone was arrested, the other defendant being returned not found. The defendant, Packard, pleaded: (1) Nonassumpsit. (2) That he signed the note, which was for $100, payable on demand, as surety for Munsion; that he urged the plaintiff to proceed immediately in collecting the money due on the note from Munsion, who was then solvent; and that, if the plaintiff had then proceeded immediately to take measures to collect the money from Munsion, he might have obtained payment from him, but the plaintiff neglected to proceed against Munsion, until he became insolvent, absconded, and went away out of the state, whereby the plaintiff was unable to collect the money of Munsion. (3) The third plea was like the second, except that the defendant alleged a promise, on the part of the plaintiff, that he would immediately proceed to collect the money of Munsion, and a breach of that promise, by which the defendant was deceived and defrauded, and prevented from obtaining the money from Munsion, etc.

There was a demurrer to the second and third pleas, and a joinder in demurrer, which was submitted in the court without argument.

Per curiam. The facts set forth in the plea are admitted by the demurrer. The principles laid down in the case of The People v. Jansen (7 Johns. 336) will warrant and support this plea. We there say, a mere delay in calling on the principal will not discharge the surety. The same principle was fully and explicitly laid down by the court, in the case of Tallmadge v. Brush. But this is not such a case. Here is a special request by the surety, to proceed to collect the money from the principal, and an averment of a loss of the money, as against the principal, in consequence of such neglect. The averments and facts stated in the plea are not repugnant, or contradictory to the terms of the note. The suit here is by the payee against the makers. The fact of Packard having been security only, is fairly to be presumed to have been known to the plaintiff. He was, in law and equity, therefore, bound to use due diligence against the principal, in order to exonerate the surety. This he has not done. There can be no substantial objections against such a plea. It may be said, the surety might have paid the note, and prosecuted the principal; but although he might have

done so, he was not bound to do it. If he had a right to expedite the plaintiff in proceeding against the principal, and chose to rest on that, he might do so. In the case of the Trent Nav. Co. v. Harley (10 East 34), the plea was similar to the present, and not demurred to. The defendant must, accordingly, have judgment upon the demurrer.

Judgment for the defendant.

Accord: Martin v. Skehan, 2 Colo. 614; Hempstead v. Watkins, 6 Ark. 317, 42 Am. Dec. 696; Thompson v. Watson, 10 Yerg. (Tenn.) 362.

Contra: Bellows v. Lovell, 22 Mass. 307; Dane v. Corduan, 24 Cal. 157, 85 Am. Dec. 53; Bull v. Allen, 19 Conn. 101.

EDWARD NEWCOMB, RECEIVER, ETC., APPELLANT, *v.* MATTHEW HALE, IMPLEADED, ETC., RESPONDENT.

90 *N. Y.* 326, 43 *Am. Rep.* 173 (1882).

Appeal from judgment of the general term of the Supreme Court, in the third judicial department, entered upon an order made May 14, 1881, which affirmed a judgment in favor of defendant Hale, entered upon a decision of the court on trial at special term.

This action was brought to foreclose a mortgage executed by defendant Cameron, which mortgage with the accompanying bond had been assigned by defendant Hale to plaintiff. In and by the assignment, Hale guaranteed the payment of the bond; this was set forth in the complaint, and a personal judgment was asked against Hale for any deficiency.

It appeared that in October, 1874, Hale served upon plaintiff a written notice requiring it to foreclose the mortgage. Subsequently he withdrew the notice, and consented that his guaranty should remain in full force so long as the interest on the mortgage was promptly paid, but notified plaintiff to proceed at once to foreclose whenever there was a default in payment of more than one instalment of interest. Interest was payable semi-annually, and none was paid after October, 1876. This action was commenced in 1879. Hale was not notified of the default in payment. It appeared that after such default the property greatly depreciated in value.

ANDREWS, CH. J.: The doctrine that a surety is entitled by notice to call upon the creditor to proceed to collect the debt by legal proceedings against the principal, on the debt becoming due, although no such obligation is imposed by the contract, and that the creditor failing to comply, the surety is discharged to the extent of the loss sustained by the delay, came into the law of this state with Pain v. Packard (13 Johns. 174), which was an action against the

defendant on a joint note signed by him as surety for one Munsion, the other joint maker, given for a debt owing by Munsion to the plaintiff. The court held that the surety was discharged by the delay of the creditor to proceed after notice to collect the note of Munsion, he having subsequently become insolvent. The same decision, under circumstances substantially similar, was made by the court of errors in King v. Baldwin (17 Johns. 384), overruling the chancellor (2 Johns. Ch. 558). The doctrine of Pain v. Packard, though frequently criticized, has not been overruled, but the courts have not been disposed to apply it, except in cases where the surety became such at the inception of the contract, or that relation was created by dealings between the parties originally bound by the contract subsequent thereto of which the creditor had notice. In Trimble v. Thorne (16 Johns. 151), the court refused to apply it to the case of an indorser for value on the ground that the indorser, though in the nature of a surety, is answerable upon an independent contract, and that it was his duty to take up the bill when dishonored.

Spencer, Ch. J., in his opinion in King v. Baldwin (17 Johns. 386), seems to assume that a surety may always proceed in a court of equity, after the debt became due, to compel the creditor to collect of the principal debtor. But the authorities do not sustain the broad proposition assumed by the learned judge. There must be some specific equity beyond the mere relation of surety and creditor to entitle the surety to this relief. (Hayes v. Ward, 4 Johns. Ch. 131; in re Babcock, 3 Story 393; Marsh v. Pike, 1 Sandf. Ch. 210; S. C., 10 Paige 595; Wright v. Nutt, 3 Bro. Ch. 326; Story's Eq., Para. 327; 2 L. C. Eq. 1890.) In the leading opinion in King v. Baldwin, the doctrine of Pain v. Packard was put on the ground of a moral or equitable duty resting upon the creditor to obtain payment of the principal debtor, and not from the surety, unless the principal is unable to pay, and that this accords with the presumed intention of the parties. This reasoning applies where the strict relation of principal and surety exists, and the latter has entered into the contract solely for the benefit of the principal debtor, and the doctrine may perhaps be consistently applied in special cases where the relation is created by subsequent dealings between the original debtors, as in Colgrove v. Tallman (67 N. Y. 95, 23 Am. Rep. 90). The case of Remsen v. Beekman (25 N. Y. 552) is within the principle of Pain v. Packard. The defendant in that case was a surety in form as well as in fact, having guaranteed the bond of one Livingston that he might obtain the release of a part of mortgaged premises from the plaintiff's mortgage.

The case here is that of a guaranty of payment made by a vendor, on the sale to the plaintiff of a bond and mortgage, the former receiving the full amount of the security as the consideration of the transfer, and the question is whether the doctrine of Pain v. Pack-

ard applies so as to release the defendant from liability on his guaranty by reason of the neglect of the plaintiff, as assignee of the bond and mortgage, to proceed after notice to collect it, the property having meanwhile depreciated in value, and the obligor having become insolvent.

The general rule is well settled, that mere delay by a creditor to collect of the principal debtor, or to proceed against a fund pledged by him for the payment of the debt, will not exonerate the surety or affect his liability, notwithstanding loss may have resulted from the delay. (Shroeppell v. Shaw, 3 Const. 446; King v. Baldwin, 2 Johns. Ch. 558; Eyre v. Everett, 2 Russ. 381; Story's Equity, Para. 326.) The rule of course yields where the duty to proceed with diligence to collect of the principal debtor is imposed by the contract, as in a case of guaranty of collection. (Northern Ins. Co. v. Wright, 76 N. Y. 445.) The creditor in such case is bound to take the necessary steps to enforce payment after the debt becomes due, without notice from the guarantor. The distinction between the situation of the defendant in this case and of the surety in the case of Pain v. Packard is very broad. The relation of principal and surety never existed between the defendant and the mortgagor. Their relation was that of debtor and creditor simply. Nor were their relations changed by the conveyance by the mortgagor to Shaffer, who in the grant assumed the payment of the mortgage. But the land, after the conveyance became in equity the primary fund for the payment of the debt, and the holder of the mortgage, with notice of the grant, could not release the land, or impair the lien of the mortgage to the prejudice of the original debtor. And in case of foreclosure, the court, having all the parties before it, would by its decree, adjust the several obligations of the parties, according to their respective equities. (Calvo v. Davies, 73 N. Y. 211; 29 Am. Rep. 130; Marshall v. Davies, 78 N. Y. 414.) The guaranty of the defendant was not entered into for the benefit of the original debtor, but for his own benefit, subsequent to the original transaction, and upon a new and independent consideration moving from the plaintiff. The engagement was collateral in form but it was in substance an original undertaking, and an immediate right of action accrued thereon to the plaintiff, on the mortgage debt becoming due. (Cardell v. McNiel, 21 N. Y. 336.) It was, by the contract, the duty of the defendant to pay the mortgage when the debt matured. The neglect in the first instance was his, and he could not, we think, by notice, impose upon his assignee the duty of proceeding against the land. Assuming that in some respects he stood in the relation of a surety, "it was his business," as said by Lord Eldon, in Wright v. Simpson (6 Ves. Jr. 714), "to see whether the principal pays, and not that of the creditor." It was said by the court, in Wells v. Mann (45 N. Y. 327, 6 Am. Rep. 93), that "it is the right of a surety to pay the debt and prosecute

the principal, and one who for value transfers the debt or security, and thereupon becomes guarantor or indorser, can protect himself against the consequences of delay in enforcing the principal obligation, and can not by notice impose upon the creditor the duty of active diligence at the risk of discharging the surety by omitting it." The qualification of the doctrine of Pain v. Packard, stated in Wells v. Mann, was recognized in Colgrove v. Tallman (supra), and is, we think, well founded. The circumstances under which the guaranty was executed, do not justify the inference of an intention between the parties that the plaintiff should resort to the land before calling upon the defendant to answer his obligation, and as the right of the defendant to subrogation to the security on payment of the mortgage was perfect and embarrassed, his remedy, if he desired to hasten the collection, was to perform his contract and proceed himself to enforce the security. This case is not, we think, governed by the doctrine of Pain v. Packard, and the judgment, so far as it relieves the defendant from liability for any deficiency which may arise on the sale of the mortgage premises, is erroneous.

Judgment as to the defendant, Hale, reversed, and modified by inserting a provision adjudging the defendant liable for any deficiency, and, as so modified, affirmed, with costs.

All concur, except Rapallo, J., absent.

Judgment accordingly.

General Code of Ohio.

Section 12191.

A person bound as surety in a written instrument for the payment of money or other valuable thing, if a right of action accrued thereon, may require his creditor, by notice in writing, to commence an action on such instrument forthwith, against the principal debtor. Unless the creditor commences such action within a reasonable time thereafter, and proceeds with due diligence, in the ordinary course of law, to recover judgment against the principal debtor for the money or other valuable thing due thereby, and to make by execution the amount thereof, the creditor, or the assignee of such instrument, so failing to comply with the requisition of such surety, thereby shall forfeit the right which he would otherwise have to demand and receive of him the amount due thereon.

Strict compliance with statutes of this kind is necessary if the surety would avail himself of the defense of having given notice to sue. Moormann v. Voss, 77 Ohio St. 270, 83 N. E. 76; Thompson v. Treller, 82 Ark. 247, 101 S. W. 174; Williams v. Ogg, 42 Tex. Civ. App. 558, 94 S. W. 420; Edmonton v. Potts, 111 Va. 79, 68 S. E. 254, 21 Ann. Cas. 1365.

SECTION 8. DICHARGE OF THE PRINCIPAL DEBTOR

WM. D. TROTTER, USE, ETC., *v.* JAMES W. STRONG, IMPLEADED, ETC.

63 *Ill.* 272 (1872).

Mr. Justice Walker delivered the opinion of the court:

This was an action of debt, brought by appellant in the Morgan circuit court against appellee, Charles D. Roberts, George W. Graves and Charles Chappell, on a judgment previously recovered in that court by appellant against appellee and his codefendants. The amount of the recovery was $2,039.58. There was no service, but appellee, Strong, appeared to the action and filed a plea: that the foundation of the judgment sued upon was a promissory note given by defendants to plaintiff, and that Graves and Roberts were the principal debtors, and Chappell and appellee were only sureties thereon; that since the rendition of the judgment, and before the commencement of the suit, appellant, without notice to, or the consent of appellee, and without his subsequent ratification, entered into an agreement with Roberts, one of the principal debtors in the note and judgment, that, in consideration that he would pay $500 on the judgment, and would give security for its payment, he would never collect any further portion of the judgment from him, and that the security was given according to the agreement; that Roberts was then insolvent; that appellee was and is thereby released from further liability.

To this appellant filed a replication admitting the agreement by plaintiff not to enforce the judgment against Roberts, but averred that he did not agree that he would collect nothing more from the other defendants to the judgment, or to release them from its payment. To this replication appellee filed a demurrer which was sustained by the court, and appellant standing by his replication, the court rendered judgment in favor of appellee, from which this appeal is prosecuted. And it is urged that the court should have sustained the demurrer to the plea, and not to the replication.

It is urged that, as no release was executed, it had no binding effect on the parties to the agreement, and appellee is in no wise prejudiced by the arrangement. Had this contract been made in reference to the note upon which the judgment was recovered, there could be no doubt that it would have operated as a discharge of the sureties. In such cases, an extension of time by a binding agreement, capable of being enforced, not to sue, when made with the principal debtor without the consent of the sureties, operates to discharge them; or, such an agreement with the principal that the

creditor will receive a part only of his debt, and would not sue for the remainder, would produce the same result.

When a creditor receives a part of the claim from the principal debtor, under such circumstances as would constitute a satisfaction of his liability, the surety must be discharged. In such a case the debt is satisfied, and the surety can not be liable for the payment of a debt that is discharged. If he were held liable, he could not recover over against the principal, because he is discharged from the debt and owes the creditor nothing, and the surety could not recover for money paid to the use of the principal, as he owes nothing, and when the surety makes the payment it can not be for the use of the principal debtor. To enforce payment from the surety under such circumstances would be to deprive him of his legal right to be reimbursed for the money thus paid. It would change the relations of principal and surety, deprive the latter of a legal right, and would operate unjustly. When the creditor, therefore, without the assent of the surety, discharges the principal debtor, it must follow that the surety can no longer be held liable. His liability can not survive that of his principal, unless it be by his own agreement.

It is, however, urged that in this case there was no consideration to support the agreement. When Roberts gave Brown as surety for the payment of the $500, the contract was consummated, and the fact that appellant had obtained security for the sum was a consideration sufficient in law to support the agreement. Had he sued on the note given by Roberts and Brown, they could not have interposed as a defense the want of consideration. The agreement to discharge Roberts from paying any further sum on the judgment could have been effectually replied to such a defense. And should appellant attempt to enforce the judgment against Roberts, he could prevent it by showing the agreement, and that appellant, as the consideration therefor, had obtained a new security and the liability of another person not a party to the judgment. It is a valid and binding agreement, unless such contracts have no force when they refer to a judgment instead of a note or agreement, not merged in a judgment.

Some cases have held that, after a contract has been reduced to a judgment, the equity of the surety terminates with regard to the creditor, and the prior obligation in the new one created by the law. These cases proceed upon the ground that such equities can be shown neither when the contract is under seal, nor when it has been reduced to a judgment. But other cases hold that, as the equity of the surety against the creditor is founded upon that which exists between himself and the principal, it survives the judgment. It is difficult to see why the surety should be protected against the interference of the creditor by dealing with the principal to the injury of the surety before, and can not be after the judg-

ment is rendered. To give time, or to discharge the principal after judgment, would be as injurious to the surety as before judgment. In either case the injury is the same, and why not have the same protection? One of two sureties may, undeniably, have contribution after payment of the judgment, and the surety may recover over against the principal when he has satisfied the judgment. Then, why permit the creditor to release or discharge the principal, and still hold the surety liable when he can not have contribution from his principal?

Some cases favor the doctrine that, whenever acts would discharge the surety before judgment, and while his obligation is only one of contract, will have the same effect after it has passed into a judgment. The Commonwealth v. Miller, 8 S. & R. 452; Potts v. Nathans, 1 W. & S. 155; The Manufacturers' Bank v. The Bank of Pennsylvania, 7 W. & S. 335; Talmadge v. Burlingame, 9 Barr 21; Carpenter v. King, 9 Metc. 511; Bangs v. Strong, 10 Paige 11; 7 Hill 520; 4 Comstock 315; Boughton v. The Bank of Orleans, 2 Barb. Ch. R. 458. And the rule seems to be more consonant with reason and justice. It prevents wrong and injury, protects the surety in his just right to look to his principal for indemnity when he is damnified by his undertaking, and prevents the creditor from discharging the principal and imposing the entire burthen upon the surety without means of redress. The fact that appellant did not agree to discharge the surety does not, in the slightest degree, change his rights. Were these all principals, then it may be a different rule would obtain, but we are not prepared to hold that it would.

The court below did not err in refusing to sustain the demurrer to defendant's plea, and the judgment must be affirmed.

Judgment affirmed.

Accord: Couch v. Waring, 9 Conn. 261.

WILLIAM SOHIER *v.* BENJAMIN LORING ET AL.

60 *Mass.* 537 (1850).

This was an appeal from a decision of Ellis Gray Loring, Esquire, a master in chancery for this county, overruling the motion of the appellant, as assignee of Edward H. Green and company, insolvent debtors, to expunge or reduce the amount of certain claims, proved before the master against the estate of Green and company. The case was submitted to the court upon the following agreed statement of facts: On the 23d of February, 1846, a warrant was issued by the said master against the estate of Edward H. Green and John E. Short, both of Boston, merchants and partners, doing busi-

ness under the firm of Edward H. Green and company. The first publication of the notice required by the warrant was made on the 24th of February, 1846, and, on the 11th of March following, the appellant was chosen assignee, and duly received an assignment of all the insolvent's estate.

Previous to their insolvency, Green and company, as copartners, were employed by Oliver P. Mills, of New York, to make and negotiate certain bills of exchange, drawn on the firm of Mayor and Wallace, of London; and from time to time, as opportunity offered, Green and company had drawn on account of Mills various bills of exchange, against consignments of goods in the hands of Mayor and Wallace belonging to Mills, which bills were sold in the usual course of business to the appellee. Green and company, for a commission paid to them by Mills, had become responsible as the drawers or indorsers of these bills, which were duly accepted by Mayor and Wallace, but were not paid at maturity. Notice of their dishonor was duly sent to the drawers, and the bills were taken up by the appellees, and proved by them against the estate of Green and company.

The appellees, whose claims were thus proved, were Hawes, Gray and company, proved on the 10th of March, 1846; Benjamin Loring and Levi H. Marsh, executors of Elijah Loring, proved on the 20th of March; Thomas Tarbell and company, proved on the 29th of April, 1846; and Samuel May and company, proved on the 18th of January, 1847; the whole amounting to about $26,000.

The bills proved by Hawes, Gray and company were drawn by Mills payable to his own order and indorsed by him to the order of Green and company, and by them indorsed. The bills proved by the other appellees were drawn by Green and company, on account of Mills. All the bills were directed to Mayor and Wallace, and were by them accepted. The several appellees sent their bills to England in payment of debts or to make purchases there during the months of November and December, 1845; and the bills were at maturity returned to them dishonored, by due course of mail.

At a meeting of the parties holding bills drawn by or by the order of Oliver P. Mills held in London on the 5th of June, 1846, a proposition for compromising their claims against Mayor and Wallace on these bills was agreed to; and, on the 2nd of December following, an indenture for that purpose was drawn up and executed at London by Mayor and Wallace, by these bill holders, including the appellees, by their respective agents, and by certain trustees appointed under the composition deed. This composition deed recited that Mayor and Wallace, being unable to pay in full all their debts, had proposed to pay their creditors, including the parties holding bills drawn by or by the order of Oliver P. Mills and accepted by Mayor and Wallace, a composition of five shillings in the pound, on the amount of their debts, by three equal instalments, payable

at three, six, and nine months from the date of the deed, and to be secured by promissory notes of James Wallace, payable at these periods respectively, in full satisfaction and discharge of such debts; and that their creditors, including said bill holders, had consented to and agreed to accept such composition; and that the bill holders had received in addition to this composition four shillings in the pound in money. Mayor and Wallace by this deed assigned certain goods to certain trustees therein named, in trust, to sell and convert the same into money and divide the proceeds among the bill holders parties to the composition deed; and the bill holders covenanted not to sue Mayor and Wallace on said bills of exchange, unless on default of payment of the notes of James Wallace; and that upon payment of those notes to the trustees, the bill holders would release Mayor and Wallace from the said bills of exchange. Then followed this clause: "Provided always, and it is hereby expressly agreed and declared, that it shall be lawful for the said bill holders, parties hereto of the second part, to execute these presents without prejudice to their rights and remedies upon the said bills, mentioned in the second schedule hereunder written, respectively, or upon collateral or other securities for the same, respectively, against any person or persons whomsoever other than the said McKedy Mayor and James Wallace, or either of them, their or either of their heirs, executors, and administrators; and that, notwithstanding these presents, or anything herein contained, they, the said bill holders, respectively, and their respective executors, administrators, and assigns, shall be at liberty to enforce and adopt all or any of such rights or remedies, against any such other person or persons, in the same manner as if these presents had not been executed." And the bill holders covenanted to indemnify the trustees from all claims for or on account of the goods assigned to them, in trust, or the payment of any dividend out of the proceeds thereof.

The dividends which were made under this indenture, amounting to four shillings in the pound, have been received by the appellees respectively.

On the 4th of August, 1847, the appellant, as the assignee of Green and company, filed with the master in chancery a written motion that the claims of the several appellees should be expunged from the list of debts proved against Green and company; or, if not expunged, that they should be reduced in amount, by deducting therefrom the payments received by the appellees, respectively, under the provisions of the composition deed; but the master, after due hearing, overruled the motion, and the assignee appealed to this court.

It was agreed that if the courts should sustain the master's decision judgment should be entered for the appellee, but if the court should reverse the decision of the master, the case might be sent

to a jury, to be tried on such issue or issues as the court should direct, or otherwise disposed of as they should determine.

METCALF, J.: The composition made with the acceptors would have discharged the drawers and indorsers, if there had not been inserted in the composition deed a proviso that it should not prejudice the holders' remedies against any other parties besides the acceptors. Byles on Bills (2d Amer. ed.), 357, 358. The first question in the case, therefore, is: what is the legal effect of that proviso?

It is settled, in England, that a discharge or giving time, by a creditor to his principal debtor, will not discharge the surety, if there be an agreement between the creditor and the principal debtor that the surety shall not be discharged. And this rule of law is applicable to parties to bills of exchange and promissory notes, who are liable only on the failure of prior parties, though they are not technically sureties of those parties. 1 Steph. N. P. 936; Montagu on Composition, 36; Burge on Suretyship, 210; Chit. on Bills (10th Amer. ed.), 420; Byles on Bills (2d Amer. ed.), 202. See also Mallet v. Thompson, 5 Esp. R. 178. The same doctrine was advanced by Messrs. Hamilton and Riker, in argument, and was recognized by the Supreme Court of New York, in Stewart v. Eden, 2 Chaines 121, very soon after it had been laid down by Lord Eldon, in Ex Parte Gifford, 6 Ves. 805. In this last case Lord Eldon said sureties would not be discharged by a discharge of the principal, if there was "a reserve of the remedy" against the surety, and that Lord Thurlow had so admitted in a previous case not reported. He afterwards laid down this principle more authoritatively in Boultbee v. Stubbs, 18 Ves. 20, and Ex Parte Carstairs, 1 Buck 560. In Ex Parte Glendinning, 1 Buck 517, he said, "If a man by deed agree to give his principal debtor time, and in the deed expressly stipulate for the reservation of all his remedies against other persons, they shall still remain liable, notwithstanding the arrangement between their principal and the creditor."

In Nicols v. Norris, 3 Barn. & Adolph 41, the court of king's bench decided that a composition like that in the present case, made with the indorser of a note given for his accommodation, did not discharge the maker. It was said by the court that such composition deeds were very common, and that the special proviso took the case out of the common rule as to the discharge of sureties by giving time to the principal.

In 1846 the case of Kearsley v. Cole, 16 Mees. & Welsb. 128, came before the court of exchequer. That was an action for money paid for the defendant, for whom the plaintiff had been surety. The defense was that the defendant had made an assignment to his creditors, who had covenanted not to sue him. But it appeared that there was a proviso in the deed of assignment that any creditor

might execute it without prejudice to any specific lien or security, or to any claim against any surety, and that this proviso was inserted with the knowledge and consent of the plaintiff. He was afterward called on as surety of the defendant, and paid the claim. The question was whether this payment was to the use of the defendant, or was a voluntary payment, which gave him no right to reimbursement. The court held that the plaintiff was entitled to recover; he not having been discharged from his suretyship by the deed of assignment. The opinion of the court was given by Mr. Baron Parke, who fully and clearly stated the decisions and the principles upon which they were made, as follows: "The question is, what is the effect of a discharge with reserve or remedies consented to by the surety? We do not mean to intimate any doubt as to the effect of a reserve of remedies without such consent; and the cases are numerous that it prevents the discharge of a surety, which would otherwise be the result of a composition with, or giving time to, a debtor, by a binding instrument; and the reserve of remedies has that effect upon this principle—first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, that it prevents the rights of the surety against the debtor being impaired —the injury to such rights being the other reason; for the debtor can not complain if, the instant afterwards, the surety enforces those rights against him; and his consent that the creditor shall have recourse against the surety is, impliedly, a consent that the surety shall have recourse against him. This is the effect of what Lord Eldon says in Ex Parte Gifford and Boultbee v. Stubbs, as to the reserve of remedies; and the general proposition that, with that recourse, the composition or giving time does not discharge the surety, is supported by those and the following cases: Ex Parte Glendinning; Nicols v. Norris; Smith v. Winter, 4 Mees. & Welsb. 454, and others. This point must, therefore, be considered as settled. Some remarks have, indeed, been made by Lord Denman, in the case of Nicholson v. Revill, 4 Adolph. & Ellis 675, on the doctrine of Lord Eldon in Ex Parte Gifford, throwing doubt on its correctness, on the supposition that Lord Eldon had held that a creditor could release one joint and several debtor, and hold another liable by a reserve of remedies; which would certainly be against the decision in Cheetham v. Ward, 1 Bos. & Pul. 630, unless the instrument of release could, by reason of the context, be construed to be a covenant not to sue, as it was in the case of Solly v. Forbes, 2 Brod. & Bing. 38. But we consider it clear that Lord Eldon meant only to apply the doctrine to cases where there was no release, but a composition, or giving time, not amounting to a release, which is the present case; and, with reference to it, the rule laid down by Lord Eldon is not impeached by Lord Denman's

remarks." And the decision of the court was that the surety's consent to the creditors' reserve of their remedy against him did not alter the law of the case in favor of the principal.

These doctrines were incidentally recognized by Mr. Justice Wilde in American Bank v. Baker, 4 Met. 175, and were adopted and applied by the court of appeals of Maryland in Clagett v. Salmon, 5 Gill & Johns. 314.

It is very obvious that a principal debtor may gain little or nothing by such a composition as this with his creditor; inasmuch as he is left liable to the like proceedings against him by his sureties, which his creditor might have instituted, if no composition had been made. But if he pleases to subject himself to that liability, by voluntarily executing an agreement which has that effect, there is no legal reason why he should not be held to that agreement.

On these grounds we are of opinion that the holders of the bills, in the present case, were rightly permitted by the master to prove their claims thereon against the drawers and indorsers; the latter not having been discharged by the composition made by the former with the acceptors.

The second question respects the amount which the holders were entitled to prove against the drawers and indorsers. And we are of opinion that each was entitled to prove the full sum due and unpaid, at the time of making proof, on the bill or bills held by him. This question is not settled by any provision in our insolvent laws; and we therefore adopt the rule applied in bankruptcy. That rule is that a holder may prove his claim, under commissions against the drawer, acceptor, and indorser, and receive a dividend from each upon his whole claim, provided he does not receive, in the whole, more than his full due. But there is a distinction in this case, when a holder applies to prove his debt against one party, after having received a part of it from another, and when he applies to prove before receiving any payment or composition from another party, or before a dividend has been declared in his favor, under a commission against another party. Any sum actually received in payment, from any party to a bill, before proof made against another, must be deducted from the amount to be proved against any other party. So, as a general rule, must the amount of the dividend, declared on the estate of another party, be deducted. Cooper v. Pepys, and Ex Parte Wildman, 1 Atk. 107, 109; see 5 Ves. (Perkins' ed.) 449, note; Eden's Bankr. Law (2d ed.), 155; 1 Mont. & Ayrt. Pract. in Bankruptcy, 202, 203.

In the present case we regard the composition made with the acceptors on the 23d of December, 1846, as payment of one-fifth of the amount of the bills. The acceptors then conveyed property in trust to pay one-fifth, and the holders accepted that conveyance. But all the holders, except May and company, made proof of their claims against the estate of Green and Short, drawers or indorsers,

before they made the composition with the acceptors, and were therefore entitled, according to the rule just stated, to prove the full amount then due on their bills. May and company having made proof after they had executed the composition deed, by which they, in legal effect, had received part payment from the acceptors, were entitled to prove only the amount due after deducting that payment.

The proceedings of the master, from which this appeal was taken, are affirmed in all things except as to the amount proved by May and company, which is to be reduced by deducting the sum received by them under the composition with the acceptors.

Accord: Rockville Nat. Bank v. Holt, 58 Conn. 526, 20 Atl. 669, 18 Am. St. 293; Mueller v. Dobschuetz, 89 Ill. 176.

JONES, RESPONDENT, *v.* WARD, APPELLANT.

71 *Wis.* 152, 36 *N. W.* 711 (1888).

Action on two promissory notes. The facts in the case, as they appear by the testimony and the findings of the court, are as follows:

November 11, 1884, one McArthur and the plaintiff, Jones, were the owners, in unequal shares, of a printing establishment consisting of presses and printing materials, from which establishment was issued a weekly newspaper called "The Dodgeville Sun." They also owned a quantity of book accounts, which had accrued in their business. On that day McArthur sold a portion of his interest in such establishment to one George E. Ward. December 1, 1884, George E. sold a portion of his interest in the property to the plaintiff, giving him a note for $345, which the defendant, his brother, signed as surety. This is one of the notes in suit in this action, but the defendant's liability thereon is not disputed. December 12, 1884, the plaintiff sold the interest in the property to one Cook, for $600, taking therefor three notes of $200 each, signed by Cook and also by the defendant as a surety for Cook. One of these $200 notes is sued upon in this action, and the defendant contests his liability thereon. At the same time, Cook executed to the defendant a chattel mortgage on the property so purchased by him, conditional for the payment of the three $200 notes, upon which the defendant had thus become liable as surety. January 3, 1885, George E. Ward sold his interest in the property to McArthur. January 8, 1885, Cook sold his interest therein to George E. Ward. One of the considerations of this sale was that the latter should induce the plaintiff to release Cook from liability on the three $200 notes. The plaintiff did so release Cook, without the consent or knowledge of the defendant. No payment was made on the notes as consideration of the release. January 28, 1885, George E. Ward, by the defendant

as his agent, sold his interest in the property to McArthur. As one of the considerations of this sale the defendant assigned to McArthur the mortgage of December 12, 1884, executed to him by Cook. At the date of such assignment, such mortgage interest was worth more than the amount due on the $200 note in suit. Such assignment was made without the consent of the plaintiff, and, after it was made, McArthur withdrew the mortgage from the files of the town clerk's office.

From the above facts the circuit court held that the defendant, being fully indemnified by Cook's chattel mortgage to the extent of the $200 note in suit, is liable to the plaintiff for the amount of such note. Judgment for the plaintiff was entered accordingly for the amount due on both notes in suit, from which judgment the defendant appeals.

Lyon, J.: Briefly stated, the case, so far as there is any controversy, is as follows: The defendant became surety for Cook's debt to the plaintiff, and Cook indemnified him by executing to him a chattel mortgage on certain property. The plaintiff released Cook from liability for such debt, without the consent of the defendant. Afterwards, defendant sold his security to McArthur, without the consent of the plaintiff, for the consideration (as the circuit court found) of $475.

The only question in this case is: Did the release of Cook also release the defendant, his surety? The general rule undoubtedly is that the release of the principal debtor, without the consent of the surety, releases the surety. But if the surety is fully indemnified against loss by reason of having become such, a release of the principal without payment of the debt does not release the surety. This is the rule laid down in Fay v. Tower, 58 Wis. 286, as applied to a case in which an unauthorized extension of credit had been given to the principal. Manifestly the same rule should be applied where the surety is absolutely released from the debt. The rule is founded upon a very plain principle of justice. To illustrate: A becomes security for B to C for the payment of $1,000. B puts property into the hands of A worth $1,000, to indemnify him against loss because of the obligation thus assumed by him. C releases B, the principal debtor, from all liability on account of the debt, but receives no payment thereon. A, the surety, then sells the pledged property for $1,000 and retains the proceeds. It is entirely reasonable and just that, notwithstanding the release of the principal debtor, C should have his remedy against the surety for the amount realized by him in the sale of the pledged property. Such, we think, is the law. It seems to us that we have here just such a case.

By the court—The judgment of the circuit court is affirmed.

Accord: Moore v. Paine, 12 Wend. 123.

AMES *v.* MACLAY ET AL.

14 *Iowa* 281 (1862).

Complainant and others were the sureties upon the bond of one McDonald, who was elected sheriff of Clinton county in 1851. For an alleged nonfeasance, Maclay sued on this bond in 1854. The principal and his sureties severed in their defenses. A demurrer of the sureties in that action to the reply of the plaintiff was overruled, and judgment was rendered against them. On the trial of the issues between Maclay and the sheriff, the latter succeeded. A motion was made by the sureties to set aside the judgment against them, which, as far as shown by the record, was not determined. Complainant now brings this bill to set aside said judgment. The cause was referred to a master, who recommended that the bill should be dismissed. This report was confirmed, and complainant appeals.

WRIGHT, J.: The judgment upon demurrer against the sureties was rendered on the 4th of March, 1848. The verdict and judgment in favor of McDonald, the principal, was on the 5th of the month.

Respondents resist the relief asked, upon the ground that there was neither accident, mistake, misrepresentation, nor fraud, and that chancery has no jurisdiction, although the party has lost his remedy at law through ignorance of a fact which he might have learned with due diligence and inquiry, or by bill of discovery. Penny v. Martin, 4 John. Ch. 566. Or, the same principle may be stated as in Ballance v. Loomis, 22 Ills. 82, that if a party seeks to set aside a judgment by proceeding in chancery, he must show himself clear of all laches, and also that every effort was made to prevent a judgment against him. Or, still again, as in Kreichbaum v. Bridges & Powers, 1 Iowa 14, following Story's Eq. Jur., 887, that, to authorize relief against a judgment, it must appear that it is against conscience to execute it, and also that the injured party could not have availed himself of the main facts, at or before the trial, and that there was no fault or negligence on his part. And see Houston v. Wolcott, 7 Iowa 173.

Complainant does not controvert these principles, but places his case upon the ground that as the principal, McDonald, by the verdict and judgment was discharged from his liability, the sureties are, in equity, discharged. And this proposition he bases upon the doctrine that the rights of the surety, and his relation to his principal, are the same after as before judgment, and that when from any cause the principal ceases to be bound, the liability of the surety should likewise cease. Or, following Jackson v. Griswold, 4 Hill

529, the argument is this: that a decision against the debt discharges the surety. And this, not upon the ground that he is a party to such decision, but because the judgment extinguishes the debt; and the principal thing being thus destroyed, the incident (the obligation of the surety) is destroyed with it. The effect is the same as a release by the creditor, or a payment by the debtor, who may do any act in discharge of his surety, but nothing by which he shall be concluded beyond his original objection.

As favoring these views, complainant cites a number of cases, to the effect that if the creditor, after judgment, shall disable himself from collecting his debt from his principal debtor, he is held to have exonerated the surety also. Of this class is Hubbell v. Carpenter, 5 Barb. 520, where the creditor after judgment gave the maker of the note an obligation not to collect the same against him, but reserved the right to enforce it against the indorser. So, in The Manufacturers' and Mechanics' Bank v. The Bank of Pennsylvania, 9 Watts & Serg. 335, where the creditor after judgment entered into an agreement with the maker of the note to stay proceedings against him. And substantially to the same effect is Storms v. Thorn, 3 Barb. 314, and the other authorities cited. We are not inclined, however, to give these cases weight, as applied to this case. To make them applicable we must first assume that the judgment in favor of the sheriff was the act of the creditor, after judgment against the sureties, in the same sense and to the same effect as the stipulation to give time to the principal debtor, or an agreement to release him. The reasoning which upholds this proposition is not tenable. If the judgment in favor of McDonald in equity discharges the sureties from their liability, it must be not because it was the agreement or act of Maclay, but because it being determined that the principal is not liable, the incidental liability, that of the sureties, likewise ceases.

Chitty, in his work on Contracts, 460, quoting from Pothier, says that: "It results from a definition of a surety's engagement as being accessory to a principal obligation, that the extinction of the principal obligation necessarily induces that of the surety; it being of the nature of an accessory obligation that it can not exist without its principal; therefore, whenever the principal is discharged in whatever manner it may be, not only by actual payment or a compensation, but also by a release, the surety is discharged likewise; for the essence of the obligation being that the surety is only obliged on behalf of a principal debtor, he is therefore no longer obliged when there is no longer any principal for whom he is obliged." This rule comports with the duties and relations of the surety to the principal, accords with reason and good conscience, and is fully recognized by the authorities. Is there, then, in this case, any technical or stern rule of the law to prevent its application? We conclude not, and that we can do what right reason and good

conscience dictate, without running counter to the rule which requires diligence from suitors in all courts, or the equivalent principle that a party who applies for relief against a judgment at law must show injustice, and that he has been without fault or negligence.

What are the facts of this case? McDonald, the sheriff, was the principal, and of course primarily and principally liable for the alleged nonfeasance. He, after a full and fair trial, has been entirely and absolutely released from his liability. In other words, it has been authoritatively determined by the judgment of a competent tribunal that the alleged nonfeasance was not established, and that plaintiff (one of the present respondents) had no cause of action. By this adjudication the principal "is no longer obliged," or obligated, so far as the claim of Maclay is concerned. Now, does it accord with the alphabet principles governing the relation of principal and surety that the latter shall be obliged to pay that for which the former is no longer liable? Or rather, is it not consistent with every rule governing the relation that, as the condition of the surety as to be favored, he should not be required to pay a debt which he can never recover from his principal, the principal obligation having been extinguished?

But it is suggested that this view loses sight of the fact that the sureties severed in their pleas, and that they were guilty of negligence in not relying upon the same defense as that made by their principal. We are not unmindful of the at least apparent strength of the argument. It is to be remembered, however, that judgment was rendered against the sureties before the issues were tried between their principal and the creditor. It was, therefore, practically impossible for them to rely upon such subsequent adjudication as a protection to themselves. And then suppose they had plead the same defense, and the result had been the same as it was. Would this have been such diligence as to obviate the effect of the rule for which respondents insist? If it would, we confess that we can not see how they should be placed in any worse position by having mistaken their proper legal defense.

But the argument that the sureties are concluded and forever estopped from resisting the judgment against them by their failure to present their proper defense is radically defective in that it ignores the great general principles at the foundation of their liability, and continues the accessory obligation after that which induced it has been completely extinguished. We would not say that if the principal had been discharged before, and the sureties had failed to rely upon that fact as a legal defense, they could be afterwards heard in equity. That case is not before us. They could not avail themselves of a defense which did not exist. Their failure to make the same defense as their principal should not, in equity, conclude them to the extent of compelling the payment of money

for their principal, for which it is conclusively and finally settled he was never liable. Indeed, under such circumstances, we do not believe that a case can be found sustaining such liability.

We give no weight to the fact that a motion was made to set aside the judgment. No action was ever taken upon it. Complainant might, therefore, resort to his concurrent equitable remedy. This he has done. The decree is

Reversed.

SAMUEL T. KNAPP ET AL., RESPONDENTS, *v.* ORIEN B. ANDERSON ET AL., APPELLANTS.

71 *N. Y.* 466 (1877).

Appeal from judgment of the general term of the Supreme Court, in the first judicial department, affirming a judgment in favor of plaintiffs, entered upon an order sustaining a demurrer to defendants' answer herein.

This action was brought against defendants as sureties upon an undertaking upon appeal from a judgment in favor of plaintiffs against one Henry S. Leszynsky.

The undertaking was that appellant would pay all costs and damages awarded against him on appeal, not exceeding $500; and in case the judgment appealed from was affirmed in whole or in part, or the appeal dismissed, that he would pay the amount directed to be paid. The defendants set up in their answer a discharge of the judgment debtor in bankruptcy, after the rendition of the judgment and pending the appeal. Plaintiffs demurred on the ground that the answer did not state facts constituting a defense.

Allen, J.: The defendants did not, by their undertaking, become liable for the debt of their principal, but their obligation was contingent and incident to the legal proceedings for the payment of the judgment that might be rendered upon the appeal. It did not become a debt until the happening of the contingency named, and is not, therefore, within the saving provisions of § 33 of the United States Bankrupt Act of 1867. That section only applies to sureties liable for the debts of the bankrupt existing before, and which would be discharged by the bankrupt proceedings. (Carpenter v. Turrell, 100 Mass. 450; Odell v. Wootten, 38 Gen. 224.)

The defendants' liability rests upon the terms of their undertaking, rather than the clause of the bankrupt act referred to, which only has respect to those liable for the same debt, for or with the bankrupt, "either as partner, joint contractor, indorser, surety or otherwise."

The whole tenor of the act shows that this was designed to in-

clude only such debts as were provable against the bankrupt under the act. The defendants undertook, for the payment of all costs that might be awarded against Leszynsky, their principal, the appellant in the action on the appeal and the judgment appealed from, in case the same should be affirmed or the appeal should be dismissed. This was in compliance with the statute (Code, 334, 335), and stayed all proceedings in execution of the judgment. The obligation became operative, and their liability fixed by the final judgment of the appellate court, affirming the judgment appealed from and awarding costs against the appellant.

The discharge of the appellant in bankruptcy, pending the appeal, did not release the sureties upon the appeal from their liability. The discharge did not affect the appeal or stay proceedings upon it, or prevent a judgment therein. (Cornell v. Dakin, 38 N. Y. 253.) If the appellant could have availed himself of his discharge to prevent a judgment and terminate the appeal and the action before judgment, or a dismissal of the appeal, the sureties would have been released, for the very obvious reason that the contingency upon which their liability was to be made operative could not arise. (Carpenter v. Turrell; Cornell v. Dakin, supra; Poppenhousen v. Seely, 3 Abb. Ct. of App. Dec. 615; Odell v. Wootten, supra; Payne v. Able, 7 Bush. (Ky.) 344; S. C., 4 Bank Reg. 220.)

Bail to the action may be released on motion if their principal is discharged from his debts before their liability is fixed as bail, for the reason that they may at any time surrender their principal, and as upon his surrender he would be entitled to his immediate discharge, to avoid circuity, courts release bail without the formality of a surrender. But after their liability has become fixed, it is not released by the discharge of their principal.

Bail, in error or surety in an undertaking upon appeal, for the performance of the judgment that may be given by the appellant court, are not released from their obligation by the discharge in bankruptcy of their principal, pending the appeal, unless the discharge may be interposed to prevent judgment. (Hall v. Fowler, 6 Hill 630; Flagg v. Taylor, 6 Mass. 34; Burr v. Carr, 7 Bing. 508; Southcote v. Braithwaite, 1 T. R. 624.)

Upon final judgment by the appellate court, the contingency arises upon which, by the terms of their contract imposed by the statute as a condition of a stay of execution upon the judgment appealed from, their liability was to become absolute. To hold that they were released by the insolvency of the appellant pending the appeal would add another condition to the undertaking, not expressed in it or authorized by statute. Such a condition, inserted in the undertaking when given, would invalidate it, as not in conformity to the statute. It would also be a hardship on the respondent in the appeal, as he, instead of the sureties, would be compelled to take

the risk of the continued solvency and ability to pay of the principal, while by the stay, to indemnify against which the undertaking of the surety is given, he is deprived of the opportunity of enforcing his judgment.

The judgment must be affirmed.

All concur.

Judgment affirmed.

GUY WITTHAUS, RESPONDENT, *v.* JACOB A. ZIMMERMAN, APPELLANT

9 *App. Div. (N. Y.)* 202, 86 *N. Y. S.* 315, 14 *N. Y. Ann. Cas.* 379 (1904).

McLaughlin, J.: On the 13th of December, 1901, one Simon leased to the firm of Johnson & Anderson certain premises in the city of New York for a term of three years, at an annual rental of $4,000, payable in equal monthly instalments in advance. On the twenty-eighth of May following the plaintiff purchased the premises from Simon, subject to the lease, and in connection with the purchase of the defendant Zimmerman guaranteed the payment of the rent reserved, by an instrument, of which the following is a copy:

"In consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, I hereby guarantee the prompt payment of the rent reserved in the within lease executed between Emil Simon and the firm of Johnson & Anderson.

"Dated, New York, May 28, 1902.

"Jacob A. Zimmerman (L. S.)"

Johnson & Anderson occupied the premises from the date of the lease to and including the month of October, 1902, and paid the rent reserved during that time. On the 29th of October, 1902, they were adjudged involuntary bankrupts in the United States District Court for the southern district of New York and the rent for November, 1902, thereafter accruing, and not being paid, this action was brought to collect the same from the defendant under his guaranty. The plaintiff had a judgment in the municipal court, which was affirmed by the appellate term from which, by its permission, the defendant has appealed to this court.

The appellant contends that the adjudication in bankruptcy of Johnson & Anderson terminated the relation of landlord and tenant between them and the plaintiff, and, therefore, there was no rent due the plaintiff for the month of November, for which defendant could be held liable. In support of this contention our attention is called to several authorities in the federal court, some of which, at least, sustain it.

Thus, in Matter of Jefferson (93 Fed 948) Evans, D. J., reviewing a similar question, said: "The court sees no way to avoid the conclusion that the relation of landlord and tenant in all such cases ceases, and must of necessity cease, when the adjudication is made. If the relation does cease the landlord afterward has no tenant and the tenant has no landlord. * * * After the adjudication there is no obligation on the part of the tenant growing out of the lease. * * * No obligation upon his part to pay rent can arise when he can neither use nor occupy the property."

In Bray v. Cobb (3 Am. Bank. 788), Purnell, D. J., said: "The relation of landlord and tenant are severed by operation of the bankrupt law. The trustee of his estate may, after adjudication, occupy and use the rented or leased premises for the estate, but under such circumstances, it would be chargeable to the estate, not as rent under bankrupt's contract, but as cost and expenses of administering the same."

And in Matter of Hinckel Brewing Co. (10 Am. Bank. 484), Ray, D. J., said: "The lease is terminated by an adjudication in any event."

But our attention is also called to several authorities in the same courts holding an opposite view. Thus in Matter of Ells (98 Fed. 967), Lowell, J., said: "Had there been no clause giving the lessor the right to re-enter, the trustee in bankruptcy would have had a reasonable time to elect whether to assume or to refuse the lease. If he had assumed it, the bankruptcy would have operated like any other assignment, and would have released the bankrupt from all liability, except upon those of his covenants not already broken, which would have remained binding upon him after any other assignment. If the trustee had refused to take the lease, the bankrupt would have remained tenant as before." Then, referring to Matter of Jefferson (supra) in which an opposite view was expressed, he said: "With all respect for the learned judge, I must think the above remarks made somewhat hastily, unless they are to be taken as limited to the particular lease in question, or made to depend upon some peculiar provision of the statutes of Kentucky. * * * It follows, then, that the lease here in question was not determined by the bankruptcy of the lessee, but only by the reentry of the lessor."

And in Matter of Mitchell (8 Am. Bank. 324) Bradford, D. J., said: "Reference was made * * * to the case of In re Jefferson. * * * I am by no means satisfied with the reasoning contained in the opinion in that case." (See, also, Matter of Collignon, 4 Am. Bank. 250.) In addition to these authorities in the federal courts there are two at least in the state courts to the same effect—White v. Griffing (44 Conn. 437) and Bernhardt v. Curtis (109 La. 171). In both of these cases a recovery of rent in a lease was sought against a guarantor. In the former it was held that if

the trustee did not accept the assignment of the leasehold estate of the bankrupt the lease remained the property of the bankrupt and, consequently, the guarantor remained liable; and in the latter that the adjudication in bankruptcy did not terminate the lease nor relieve the guarantor from his liability.

It is thus seen that there is a diversity of opinion as to the effect of an adjudication in bankruptcy upon a lease. Nevertheless, the weight of authority, as well as reason, we think sustains the contention that a discharge in bankruptcy does not terminate a lease or change the legal relation of landlord and tenant "unless," as stated in Brandenburg on Bankruptcy (3d ed. 1171), "the landlord reenters or the trustee assumes the lease, in which event the adjudication operates like any other assignment and all liability of the tenant ceases."

In Parsons on Contracts (Vol. 3 (9th ed.), *489) the same view is expressed, in which it is said: "If the assignee elects not to take, the lease remains in the bankrupt with all its advantages and all its burdens and free from all claims or right either of the assignee or of the creditors."

I am also of the opinion that, even though it be held that the lease, by the adjudication, was so far terminated as to release the tenant from thereafter paying rent, this did not of itself effect the defendant's guaranty or relieve him from liability thereunder. Section 16 of the bankruptcy law (30 U. S. Stat. at Large 550) provides that "the liability of a person who is a codebtor with or guarantor or in any manner a surety for a bankrupt, shall not be altered by the discharge of such bankrupt." This language seems to negative the idea that the adjudication had any effect upon the defendant. Not only this, but to hold otherwise would destroy the benefit sought to be accomplished by the guaranty, which was the payment of the rent reversed if the tenant did not choose to, or by reason of insolvency could not, pay. The plaintiff took no part in the bankruptcy proceeding, and I am unable to see upon what principle of law a binding contract can be destroyed by an act of a third party in which a party to the contract did not participate and over whom he had no control.

Our conclusion, therefore, is that the lease was not terminated by the adjudication in bankruptcy, and as it does not appear that the trustee has taken possession under authority of the act, the tenant still remains liable for the payment of the rent, and that in any event the defendant under his guaranty is liable therefor in case of its nonpayment.

It follows that the judgment appealed from must be affirmed, with costs.

Van Brunt, P. J., Ingraham, Hatch and Laughlin, JJ., concurred.
Judgment affirmed, with costs.

GOYER COMPANY *v.* MARION B. JONES

79 *Miss.* 253, 30 *So.* 651 (1901).

TERRAL, J., delivered the opinion of the court.

The Goyer Company, in a justice of the peace court, sued M. B. Jones upon an account rendered for $159.23, and had judgment. Said M. B. Jones appealed this cause to the circuit court, and gave an appeal bond, with R. A. Jones as surety, conditioned "to pay such judgment as said circuit court may render against said M. B. Jones." More than four months after the execution of said appeal bond, an involuntary petition of bankruptcy was filed against said M. B. Jones, upon which he was adjudicated a bankrupt and received his discharge. Afterward when said cause came on to be tried in the circuit court, where the Goyer Company had obtained leave of the bankrupt court to prosecute it to judgment, M. B. Jones pleaded his discharge in bankruptcy, and the cause was submitted to the circuit judge, without jury, and he gave verdict and judgment for defendant. The appellant insists that, as section 16 of the bankrupt law preserves the liability of any person who is in any manner a surety of a bankrupt, he should have been permitted to take a judgment in the circuit court on the appeal bond against both M. B. and R. A. Jones, with a view of having the execution of said judgment stayed perpetually as to M. B. Jones, and for the sole purpose of enforcing the judgment as to R. A. Jones. The bond stipulates only for the payment of such judgment as may be rendered in the circuit court against M. B. Jones; in effect, it stipulates only to pay such valid judgment as the circuit court may render against M. B. Jones, and, as no valid judgment, under his plea of discharge in bankruptcy, could ever be rendered against him, the liability of the surety, R. A. Jones, is also determined, because the contingency upon which his liability depended can never happen. In Wolf v. Stix, 99 U. S. 1 (25 L. ed. 309), is said: "The cases are numerous in which it has been held, and, we believe, correctly, that, if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was to depend. Of this class of obligations are the ordinary bonds in attachment suits, to dissolve an attachment, appeal bonds and the like." This view of the law is supported by Collier. Coll. Bankr. (3d ed.), 180-184.

Affirmed.

SECTION 9. RELEASE OF SECURITIES HELD BY CREDITOR

PEARL *v.* DEACON

24 *Beav.* 186 (1857).

The Master of the Rolls.

The facts are shortly these: Mr. Pearson applied to the defendants, who are brewers at Windsor, for a loan of £250, to enable him to take a public-house, called The Carpenters' Arms. They said we will do so if you will get a good surety for the amount, and assign over your pension and furniture. That was agreed to; Pearson offered the plaintiff as his surety for half of the amount, and Castles as surety for the other half; the defendants accepted them, and on the 16th of November, 1852, two joint and several promissory notes were given to the defendants, one by Pearson and the plaintiff, the other by Pearson and Castles. Six days afterward, viz., on the 23rd of November, Pearson assigned his pension and all the goods and chattels to secure this debt of £250. On this transaction, the first point which was raised by the plaintiff, in my opinion, fails. He says that this arrangement was a variation of the contract of suretyship, and that it discharged the plaintiff, because the money was made payable on the 16th of November, 1858, or six years after the date of the mortgage. If the case had rested here, the plaintiff would probably have been successful, but the deed goes on, "or at such earlier or other time" as the defendants should appoint for the payment thereof "in and by a notice in writing." I do not think that this was a variation in the terms of the security as to discharge the surety; but the question is of little importance, as I am of opinion, on the evidence, that the plaintiff had notice of this assignment and of the terms of it.

The only other facts important to be stated are these: The defendants were landlords of The Carpenters' Arms, and in the year 1856, four years after this transaction, Pearson's rent being considerably in arrear, the defendants restrained and put a broker in possession of the furniture under the distress; on this, by arrangement, instead of selling the goods, they took them at a valuation for £116.

The question is this: The furniture having been expressly mortgaged for the £250, was it within the power of the defendants, to the injury of the surety, to give up the security on the furniture for the £250 and take it in discharge of another and different debt due themselves?

I am of opinion that they could not do so. It was said, that this security was not within the scope of the plaintiff's contract, and that

a surety can not go beyond it. This is a mistake with regard to the relation between a principal and a surety. Lord Eldon expressly stated, in Craythorne v. Swinburne, 14 Vesey 164, 169, that the rights of a surety depend rather on a principle of equity than upon contract; there may be a quasi contract, but it arises out of the equitable relation between the parties, to be inferred from the knowledge of an established principle of equity. The same doctrine is also stated in Mayhew v. Crickett, 2 Swan. 191, and it is laid down distinctly, that sureties are entitled to the benefit of every security which the creditor has against the principal debtor, and that whether the surety knows of the existence of those securities or not is immaterial. If the creditor makes available any of his securities, the surety is entitled to the benefit of it.

The case of Capel v. Butler, 2 Sim. & S. 457, is a distinct authority for this proposition. Mr. Ellis sought to distinguish that case by saying that, in that case, there was a recital of all the securities, but that here there was none. The answer, however, is this: That there was no notice to the surety of the whole transaction, and being so, the reciting it is immaterial. Lord Eldon distinctly laid down, in Mayhew v. Crickett, 2 Swan. 185, that it is a matter of perfect indifference, whether the surety is aware of another security having been taken by the creditor or not.

In the judgment of Vice-Chancellor Wood in Newton v. Charlton, 10 Hare 651, there is a statement, in every word of which I concur. He says, as regards the creditor, "He is bound to give to the surety the benefit of every security which he then holds; and he is not allowed, in any way, to vary the position of the surety with reference to those securities; that has been decided most distinctly in Mayhew v. Crickett by Lord Eldon, where there was a warrant of attorney in the hands of a creditor put into operation by the creditor, and a judgment obtained, from which he afterward discharged the principal debtor. Lord Eldon held it utterly immaterial, whether the warrant of attorney was known to the surety at the time he entered into the contract or not. The surety had a complete right to the benefit of it, and if the benefit were lost to him, he was at once discharged. "Affirmed by the Lord Justices, 16th of July, 1857."

It is argued that this was a security for a separate and distinct debt; but I am of opinion that it was not taken for a separate and distinct debt, but for the debt of £250.

I am of opinion, therefore, that if the defendants enforce payment of the rent due them out of the furniture, and then seek to compel the plaintiff to pay the debt for which he became surety, the plaintiff is entitled to say to them, "you must give me the benefit of the security on the furniture and pension which were mortgaged to you for this debt."

What the defendants have done is this: They have thought fit

to apply the produce of the furniture to a different and distinct debt, contrary to the original arrangement, on the terms of which, it is to be assumed, the surety consented to become liable. I am therefore of opinion, that whatever the defendants have received ought to be applied ratably in discharge of the whole debt, and that the plaintiff is only liable to pay half of the balance.

If it were otherwise, the result would be this: That if a man advanced £1,000 to another on a mortgage of an estate, and had the security of ten sureties, each of whom was liable for £100, he might release or reassign the mortgage, and then sue the ten sureties. This is a proposition impossible to be sustained.

If the defendants have received anything from Castles, it must not be taken into account; but with respect to the money received from Pearson, it ought to be taken as a discharge for the debt.

As to the pension, either they have received it or they have not; if they have, it was distinctly applicable to the payment of their debt; if they have not, they must show why they did not make that security available.

PLANKINTON, ASSIGNEE, RESPONDENT, *v.* GORMAN, IMP., APPELLANT

93 *Wis.* 560, 67 *N. W.* 1128 (1896).

Defendant Matt H. Bauer, on the 1st day of May, 1893, made his promissory note for $1,000, payable one hundred days after date, to the order of defendant Thomas Gorman, and caused the same to be indorsed by the J. Obermann Brewing Company, and thereafter, for value, delivered the same to Gorman. Gorman, thereafter, indorsed the note to H. J. Killilea, and he indorsed the same to the Plankinton Bank. Thereafter, and before the note became due, the brewing company made an assignment for the benefit of creditors. At the maturity of the note it was duly protested, so as to fix the liability of the indorsers. Thereafter the bank filed a claim for the amount due on the note in the assignment proceedings of the brewing company. Thereafter, and when the assignee had sufficient assets in his hands to pay the note, an agreement was made between plaintiff, as assignee of the bank for the benefit of creditors, the brewing company, and its assignee, without the knowledge of Gorman, whereby plaintiff, by a written instrument under seal, released the brewing company and its assignee from such claim. Evidence was offered on the trial, and received against defendant Gorman's objection, to explain such instrument and show that it was not a release in fact of the brewing company, but a mere consent to a reassignment of the property held by the assignee, so that the company might resume business and ultimately pay the

note. The evidence tended to show that the arrangement was made with a view of giving the brewing company an indefinite extension of time for the payment of the note, and that the real consideration for the release was the reassignment of the property by the assignee to the brewing company, and its resumption of business.

At the close of the evidence plaintiff moved the court to direct a verdict in his favor, and defendant Gorman made a like motion to direct a verdict in his favor. The court granted plaintiff's motion and denied defendant's motion. Judgment was entered in favor of plaintiff, and defendant Gorman appealed.

Marshall, J.: The facts are uncontroverted that plaintiff in form executed and delivered an instrument reciting as a fact that the claim on the note against the brewing company had been fully paid, satisfied, and discharged, and in consideration thereof plaintiff released and discharged such company, its assignee, and the assets held by him from such claim; that there were sufficient funds or assets in the hands of such assignee to pay the claim; that plaintiff had an interest in or lien upon such assets to the amount of such claim, which he surrendered without the consent of the second indorser, the appellant. Did such release, under the circumstances, whether the note was actually paid or not, have the effect to release appellant from the obligation of his indorsement? If so, the court erred in directing the verdict for plaintiff, and the other questions presented for review need not be considered.

The general rule is that while a creditor who has a claim against principal and surety is not bound to proceed against the principal, if he does, and obtains a lien upon his property for the payment of the debt, and then released it without resorting to proper proceedings to make therefrom satisfaction of such debt, the surety is released. Maquoketa v. Willey, 35 Iowa 323; 3 White & T. Lead. Cas. Eq. (Hare & W. Notes), 552; Chambers v. Cochran, 18 Iowa 159. Such rule applies between successive indorsers. Spring v. George, 50 Hun 227; Smith v. Erwin, 77 N. Y. 466; Shutts v. Finger, 100 N. Y. 539. The cases cited are to the effect that, though a creditor is not bound to take active measures to collect the debt, and after commencing may stop short when, if the proceedings were pursued to the end, they would result in enforcing payment, if the creditor once gets hold of or a claim on property of the principal, applicable to the payment of the debt, and then voluntarily releases it to the prejudice of the surety, such surety is discharged. In Smith v. Erwin, supra, the decision was adverse to the indorser. It was placed on the ground that the creditor had not actually obtained a lien upon the property and then abandoned or released it, but had simply neglected to obtain a lien when opportunity therefor existed. As said in Spring v. George, supra, the effect of the decision is that, if the sheriff who held the execution, instead of merely neglecting to levy on the property to satisfy the debt when he might

have done so, had made a levy, and then plaintiffs had given such directions to the sheriff as deprived them of the lien thus obtained, the indorser would have been discharged; and such is unquestionably the law. Allen v. O'Donald, 23 Fed. 573; Daniel, Neg. Inst. 1311; 1 Parsons Notes & B. 242; Byles, Bills, 253, note; Priest v. Watson, 75 Mo. 310; Winston v. Yeargin, 50 Ala. 340; Sample v. Cochran, 82 Ind. 260.

Here, as between appellant and the Obermann Brewing Company, the latter was liable for the debt. As soon as plaintiff filed his claim in the assignment proceedings, he obtained an interest in or lien on the funds or assets in the hands of the assignee for its payment, which, if enforced, would have satisfied such claim. Plaintiff became a trustee in respect to such lien or claim for the benefit of the appellant, and his subsequent voluntary release of such lien or claim, without appellant's consent, ended the latter's liability on the note.

It follows that the court erred in directing the verdict in favor of the plaintiff, for which error the judgment must be reversed and a new trial granted.

By the court: The judgment of the superior court is reversed, and the cause remanded for a new trial.

See also Day v. Ramey, 40 Ohio St. 446.

WULFF AND BILLING *v.* JAY

7 L. R. Q. B. 756 (1872).*

Cockburn, C. J.: This is an action brought against the defendant, as surety. It appears that as part of the transaction between the principal creditors and the debtors, there was to be a mortgage of the plant, trade fixtures, and things upon the debtors' premises, by bill of sale as security for the principal debt. The debtors were to remain in possession of the things thus mortgaged until default, and the creditors were to have power, in the event of a default in the payment of the instalments of the debt which were to be paid under the bill of sale, or in the event of the interest, which was to accrue from time to time, not being paid, to enter and sell the things thus assigned upon giving a month's notice.

Now, it appears that in the month of February interest first became due, and that interest was not paid, and it remained unpaid until the month of August, when the debtors became bankrupt. It further appears that the insolvent condition of the debtors' affairs was plain, and that bankruptcy was imminent, and had been impending for some time before it actually took place; and it further

*Statement of facts omitted.

appears that one of the creditors was cognizant of that fact, and was afterward, when the bankruptcy took place, solicitor to the proceedings in bankruptcy. He was therefore perfectly aware of the bankruptcy being imminent. Notwithstanding he took no steps either to protect the bill of sale by registration, or to enter and take possession of the effects.

Now, I think there was a twofold laches on the plaintiffs' part—laches in the first place in not registering the bill of sale. If they had registered it the effect would have been that the fixtures would have been protected. That would not have applied to the other movables which remaining in the order and disposition of the bankrupt would have been affected by the bankruptcy. But then there were laches if possible of a more serious description affecting not only the movables but the fixtures also. The plaintiffs might have entered and taken possession upon the interest not being paid at the time when it became due. Instead of doing this, however, they allow the mortgagors to remain in possession when they see that bankruptcy is impending and imminent. I can not doubt myself that their intention was, that, being creditors ultra the amount thus secured, the goods in question should be available as assets under the bankruptcy, while they had the security of the defendant to come upon in order to get paid the debt of £300, secured by the bill of sale. I think, looking at all the circumstances, it is impossible to say that the plaintiffs did what they ought to have done to realize the security they possessed. Cases have been cited and authorities have been referred to in Story's Equity Jurisprudence, which abundantly establish that which is a common and well-known proposition, that where a debt is secured by a surety, it is the business of the creditor, where he has security available for the payment and satisfaction of the debt, to do whatever is necessary to make that security properly available. He is bound, if the surety voluntarily proposes to pay the debt, to make over to the surety what securities he holds in respect of that debt, so that, being satisfied himself, he shall enable the surety to realize the securities and recoup himself the amount of the debt which he has had to pay. That is now a well-known proposition. Here, by registering the bill of sale, and by afterwards availing themselves of the power which they possessed to take possession, the plaintiffs might have secured the payment of the debt to themselves, or by protecting the securities and holding them in their hands they could have made them over to the surety when the surety was willing, or was called on, to pay; but by omitting to do what was necessary in order to place themselves in that position, and by allowing bankruptcy to supervene so as to enable the trustee under the bankruptcy to take possession of these goods adversely, it is clear that they have placed the surety in a position very detrimental and prejudicial to the surety; and for that the surety ought to have, according to the gen-

eral doctrine, a remedy. I think the creditors have clearly been guilty of laches in not protecting themselves and in not availing themselves of these securities. Then it is said, granted that at the end of the time when the interest had accrued the surety was liable both for principal and interest, and the principal and interest together amounted to £307 10s., although the surety is entitled to say to the creditors, "I am entitled either to have such security as you have made available for this debt, or I am entitled to set off the amount against what I owe you under my agreement to indemnify you against loss in respect of this debt," yet he can only say it to the extent of the value of the security itself. Now, it appears that these goods which the creditors might have taken possession of and made available for the payment of the debt, or to which they might have given the surety a title in order that the surety might recoup himself the amount of his debt, were of the value of £300. They sold for £300. That is exactly the amount of the original debt, and there is nothing to satisfy us that they did not realize their value; I do not find anything leading to any other conclusion than that the goods did in fact sell for what they were really worth. We must take it, therefore, that all that was realized was £300. Now, interest having accrued, the debt was £307 10s., and in respect of the odd money, the plaintiffs must have their verdict. There will, therefore, be a verdict for the plaintiffs for £7 10s.

Hannen, J.: I am of the same opinion. I think that the plea is substantially proved. We are not bound by the exact terms of it, but I take it to be established that the defendant became surety upon the faith of there being some real and substantial security pledged, as well as his own credit, to the plaintiffs; and he was entitled, therefore, to the benefit of that real and substantial security in the event of his being called on to fulfil his duty as a surety, and to pay the debt for which he had so become surety, He will, however, be discharged from his liability as surety if the creditors have put it out of their power to hand over to the surety the means of recouping himself by the security given by the principal. That doctrine is very clearly expressed in the notes in Rees v. Barrington, 2 White & Tudor's L. C., 4th ed., at p. 1002. "As a surety, on payment of the debt, is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship, if the creditor who has had, or ought to have had, them in his full possession or power, loses them or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of security will be discharged. A surety, moreover, will be released if the creditor, by reason of what he has done, can not, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands." And numerous cases are cited in support of those statements.

Now, let us see whether there has been such failure on the part of the principal creditor in this case. It was argued by Mr. Cole that there was no power to do anything by way of realizing the securities until after the month's notice. But that is not so. There is no power to realize by selling without notice, but the mortgagors are only entitled to retain possession of the property until they make default, and on their making default the mortgagees have the ordinary right of mortgagees to sieze that which is already their property, although they are restrained by the terms of the deed from selling immediately. Default was made, according to the terms of the deed, in February, when the first instalment of interest became due. Upon default taking place, the mortgagees, if they had chosen to act upon the power given them by the deed, might have taken possession of this property, the effect of which taking possession would have been to defeat both the Bills of Sale Act and the order and disposition clause in the bankruptcy act, and they would have been in a position, therefore, to hold this property as against the trustee in bankruptcy. I am not prepared to say that they were guilty of such laches the instant the interest became due as would have entitled the surety to maintain that he was released, but I think that is a question which might have gone to the surety; and if I were in the place of the jury I should certainly find that there had been laches and negligence on the part of the plaintiffs. The interest is due in February, when they might have siezed, and they took no step whatever until the bankruptcy intervenes in August, although shortly before the bankruptcy took place they became aware that the circumstances of the debtors were such as would make it right, in the interest of all parties concerned, that the security should be protected. And the case is all the more strong because one of the plaintiffs is an attorney, and therefore he would be likely to know the law; but it is clear that, he having delayed so long to take possession, there were circumstances from which the jury would be warranted in finding that there was a negligence on the part of the plaintiff in that respect, and in consequence of that negligence, the value of this security has been lost.

Then with regard to the amount: when the first payment of interest became due, the surety at one and the same amount becomes liable to pay £300 and £7 10s. That was the amount for which he was liable. I think he was not liable for anything more than that, because being discharged from the principal sum by the laches of the creditors, he is also discharged from that which is incident to the principal, namely, the interest; but that does not apply to the interest which became due at the same moment as the principal became due, and which therefore was a debt or a liability which then accrued to the surety. Then, if the security had been handed over to him, as the event shows, he would not have been able to realize

by way of recouping himself more than £300, and it follows that he would remain liable for £7 10s., and I think therefore that the verdict ought to be reduced to that amount.

QUAIN, J.: I am of the same opinion. The rule, as it is laid down by Stuart, V. C., in Strange v. Fooks, 4 Giff. at p. 412, 3 K 2, is in these words: "It is perfectly established in this court, that if through any neglect on the part of the creditor, a security to the benefit of which a surety is entitled is lost, or is not properly perfected, the surety is discharged." It seems to me that this case comes directly within that rule. The deed expressly provides that, "in the meantime, and until default be made by the mortgagors in the payment or investment, as hereinafter mentioned, the mortgagors shall remain in the possession and receipts of the rents and profits of the premises, plant, fixtures, and things," and it gives the mortgagors the right to sieze on default being made, and every other remedy, except selling, for which it is requisite that there should be a month's notice. Now that being the case the debtors make default on the 25th of February, 1871, and the mortgagors take no steps to protect the goods from the operation of the Bills of Sale Act, if it is within that act, or from the reputed ownership clause in the Bankruptcy Act. They do not take possession of the fixtures or plant, or any of these goods, but allow the property in them to pass to the trustee. The mortgagees well knew the state of their debtors, one of the mortgagees being the attorney who conducted the bankruptcy proceedings. The result is, that the mortgagees stand by and allow the whole of this property to be swept away by the trustee in bankruptcy, and sold for the benefit of the estate. It appears to me, therefore, that that property which has been allowed to be sold by the mortgagees, is the very property which the surety was entitled to have handed over to him if he paid the sum that was due, viz., £307 10s. It seems to me to fall precisely within the rule that has been referred to, and that pro tanto the surety is discharged, and the verdict ought to stand only for £7 10s.

Rule absolute to reduce the damages accordingly.

NATHANIEL F. CUMMINGS *v.* CHARLES F. LITTLE ET AL.

45 *Maine* 183 (1858).

This case was submitted to the full court, upon report of the evidence by Davis, J. The facts sufficiently appear in the opinion of the court.

The defendants were joint and several promisors upon three promissory notes, payable to Wendall P. Smith or order. Smith

also held a mortgage from one of the defendants, of whom he had the notes, of personal property of less value than the amount of the notes. Afterward, without consulting the other defendants, who were in fact sureties on the notes, though not signing as such, he discharged the mortgage. At a still later period, the notes having been long overdue, he transferred and indorsed them to the plaintiff in this action. One of the defendants has been defaulted. The other defendants introduced parol evidence, subject to the objection of plaintiff, that they became parties to the notes as sureties for the one who has been defaulted; and they contended that the surrender of the mortgaged property, by Smith, while he held the notes, discharged them from their liability.

The opinion of the court was drawn up by Davis, J.

This is an action upon three promissory notes, of the following tenor:

"PORTLAND, February 14, 1851.

"For value received, we, jointly and severally, promise to pay to Wendall P. Smith, or order, $126.35 in one year from date.

"C. F. LITTLE,
"E. P. LITTLE,
"ALEXANDER FOSS."

The notes differ only in the time of payment. And C. F. Little gave to Smith a mortgage of personal property, valued at $414, of the same date of the notes, to secure the payment thereof. These notes remained in Smith's hands until they were overdue. While he held the notes in suit, he also held another note against C. F. Little and E. P. Little, amounting to about $300, not secured by mortgage. And he agreed with C. F. Little, that if he would pay the note he, Smith, would surrender and discharge the mortgage given to secure the other notes. This was accordingly done, without the knowledge or consent of either of the sureties; and the following indorsement was made upon the mortgage:

"Portland, Oct. 1, 1853. The lien on the within described property, created by the within mortgage, is hereby declared to be discharged, and the property no longer subject to said mortgage; but the debt within described, to secure which this mortgage was given, is still subsisting, and in no part paid.

"WENDALL P. SMITH."

Smith afterward transferred the notes to the plaintiff, who has brought this suit upon them as indorsee. Charles F. Little has been defaulted. But the other defendants contend, and have introduced evidence to prove, that they were in fact sureties, though the note itself did not so indicate; and that Smith, by surrendering the collateral security taken by him of the principal, has discharged them from their liability.

It is contended that, as these defendants did not sign the notes in such a manner as to show that they were sureties, evidence of that fact is not admissible. Such evidence has often been admitted in suits between such sureties for contribution. Carpenter v. King, 9 Met. 511; Lord v. Moody, 41 Maine 127. And, where the action is against the signers, by a holder having express or implied notice of the fact that any of them are sureties, this fact may be proved by parol evidence. Harris v. Brooks, 21 Pick. 195.

It is said in argument that there is no evidence that Smith knew that Foss and E. P. Little were sureties. But, as the note was given to him, he could not have been ignorant that the consideration was between him and C. F. Little alone. He must, therefore, have known that the other defendants were sureties. And, as he transferred the notes when overdue, his indorsee, the plaintiff, had implied notice of the fact. When a person becomes a party to a bill or note at the request and for the benefit of another, whether as guarantor, indorser, or surety, the relation of principal and surety exists and must be regarded by all parties affected with notice. Griffith v. Reed, 21 Wend. 502; Pitts v. Congdon, 2 Comst. 352. This, of course, does not include an indorser of negotiable paper in the usual course of business. Such an indorser is not a surety for the maker, and is not discharged if the holder extends the time of payment, or surrenders collateral security taken from the maker. Hurd v. Little, 12 Mass. 503.

The plaintiff, in this case, having taken the notes after they were dishonored, they are subject to whatever defense might have been made to them in the hands of Smith. Did the discharge of the mortgage, by Smith, operate as a release of the sureties upon the notes?

That an extension of the time of payment given to the principal, or a surrender of collateral security, without the assent of the sureties, will discharge them from their liability, is a principle of law established, beyond all controversy, by numerous authorities. 1 Story's Eq. 325; Baker v. Briggs, 8 Pick. 122. And this—not on the ground that the contract is thereby changed—but on the ground that the surety is entitled to be subrogated to all the rights and securities of the creditor; and if the creditor, without the assent of the sureties, surrenders or impairs their rights, and thus deprives them of their means of reimbursement, he shall not afterward compel them to pay the debt. Bangs v. Strong, 4 Comst. 315; Clason v. Morris, 10 Johns. 539; Mathews v. Aiken, 1 Comst. 599.

"The rule here is undoubted," says Lord Brougham, "and is founded in the plainest principles of natural reason and justice, that the surety, paying off a debt, shall stand in the place of the creditor, and have all the rights which he has for the purpose of obtaining reimbursement." Hodgson v. Shaw, 3 Mylne & Keene 183. And Chancellor Kent says: "A surety will be entitled to

stand in the place of the creditor, to enforce every security, and to have those securities transferred to him, that he may avail himself of them against the debtor. This right stands not upon contract, but upon the same principal of natural justice upon which one surety is entitled to contribution against another." Hays v. Ward, 4 Johns. Chan. Cases 130.

Applying these principles to the case before us, it is obvious that Smith was under obligation to hold the mortgaged property, not merely for his own benefit, but for the benefit of the sureties upon the notes secured by it. And if he chose, without their assent, to surrender the security without the payment of the notes, it would be contrary to equity and good conscience for him to be allowed afterward to enforce the payment of the notes against them.

It is said, however, that these facts ought not to be held to discharge E. P. Little, because the money paid when the mortgage was discharged by Smith was appropriated in payment of a note on which he was liable with C. F. Little. And we should be of that opinion, if the money had been the proceeds of the mortgaged property. In that case, it could have made no difference to E. P. Little, whether it was applied to one note or another, he being liable on both. But it does not appear that the property was sold. C. F. Little may, at that time, have been able to pay the note without selling the property. Or, as the other note had been put in suit, E. P. Little may have furnished the money with which it was paid. Or, if C. F. Little procured it otherwise, it does not appear that he would not have paid the note, and thus settled the action commenced upon it, though Smith had refused to discharge the mortgage. The case is silent on all these points. And we can not infer that the release of the collateral security was no injury to E. P. Little, merely from the fact that another note on which he was liable was paid on the same day.

A more difficult question still remains. The notes secured by the mortgage amounted to $505.40. The property mortgaged was valued at $414. One of the notes had been paid. But the three remaining notes, which are now in suit, had been on interest from their maturity; and, at the time when the mortgage was discharged, they amounted to more than the value of the mortgaged property. It has been treated as a doubtful question, whether the value of the property stated in the mortgage is not conclusive upon the parties. Admitting that it is conclusive, it is so only in regard to the value at the date of the mortgage. Any subsequent loss or depreciation may properly be taken into consideration in estimating the value of the property at the time when the mortgage was discharged. And it is obvious that the discharge of the mortgage could have injured the sureties only to the amount of the value of the property, so estimated. And, though the sureties are discharged to that extent, for the excess of the amount due at the date of the

discharge, over and above the value of the property then released, the sureties are still liable. American Bank v. Baker, 4 Met. 164; Bank v. Colcord, 15 N. H. 119, 9 Watts & S. 36; 20 Penn. 297; 6 Sm. & Marsh. 24.

But it does not follow that they are liable in this action. If an action at law can be maintained upon the note, it can not be against the principals and sureties jointly. For, in such an action, the defendants can not be separated in the judgment. They must stand or fall together. But they are not liable for the same amount. How, then, can judgment be entered up? There is no provision of law by which the principal may be held for the whole, and the sureties for a part only, and several executions be issued accordingly. Nor have this court general equity powers, as in some of the states, by which, after judgment against all the parties, the plaintiff may be enjoined from enforcing it against the sureties for the whole amount. Therefore, in an action at law, unless they may prove the release of the collateral security as an entire defense to the action, they have no remedy. Baker v. Briggs, 8 Pick. 122. In this action, if liable at all, they are liable for the whole amount of the note. Not being liable for the whole, they can not be held in this suit for any part. If the plaintiff had released the principal, he would thereby have discharged the sureties. But the release of collateral security, of less value than the amount of the note, discharged the sureties pro tanto only. As to the plaintiff's remedy for the balance, it is unnecessary for us to express any opinion.

According to the agreement of the parties, a nonsuit must be entered.

See also Guild v. Butler, 127 Mass. 386.

NEFF'S APPEAL

9 Watts & Serg. (Pa.) 36.

Kennedy, J.: We also think that the second point of the appellants can not be sustained. It is doubtless true, if the creditor, by a new agreement with the principal, without the assent of the surety, makes any material alteration in the agreement whereby the surety became bound as such, the surety will thereby be discharged, because the only contract that bound him is no longer in being; for the change and alteration of it by the operation of the new contract, made without his consent, in effect annuls and sets aside the contract by which he bound himself, and the only one to which he was a party. So if the creditor releases the principal from the payment of the debt, he thereby releases the surety entirely. But if he releases the principal from a part only of it, he only re-

leases the surety pro tanto; and there is not even the shadow of reason why it should be considered a release for any more. So if the creditor give up to the principal or release a security which he has obtained from him for the whole of the debt, it will operate as a release or discharge of the surety from all liability as such; but if the security released be only for part of the debt, the surety will only be released pro tanto. The ground upon which the relinquishment or negligent losing of a security taken of the principal debtor by the creditor for the whole or part only of the debt, is held to be a release of the surety either for the whole or pro tanto, as the case may be, is, that the surety upon payment of the debt to the creditor, is entitled to the benefit of all securities which the creditor has, that he could have rendered available against the principal debtor; and if any of those securities have become lost, or have become lessened in value, in consequence of the neglect or default of the creditor, the surety's liability to the creditor will be diminished to that extent. Vide Pitman on Principal and Surety 113-14; 40 Law Lib. 86; Theobald on Principal and Surety 84, 85, etc.; Commonwealth v. Miller (8 Serg. & Rawle 452, 457-8); 2 Swanst. 189. When the real value of the security, lost by neglect of, or given up by the creditor, is capable of being ascertained with certainty, and it is less than the amount of the debt, it would not only be contrary to reason to extinguish the liability of the surety entirely, as a diminution equal in extent to the value of the security given up or lost is amply sufficient to protect him from any loss that could accrue from his not obtaining such security, which is the utmost that he can with reason claim; but it would likewise be repugnant to the ground or principle upon which the surety has a right to claim a discharge from his liability as such. But when it is impracticable to ascertain, with any degree of certainty, whether the security lost or relinquished might not have availed the surety to the full extent of the debt, in case he had paid it, it would seem to be right that he should be discharged entirely from all liability, and that burthen of proving the value of the security should lie on the creditor. In the present case, however, although it appears that Mrs. Wilcox released thirty acres of the land of the principal debtor from the lien of her judgment, yet it was done for the purpose of increasing the value of the security, and, in this respect, rendering it more certain, which she had for the payment of her debt, instead of lessening it; and in the opinion of the auditor, and according to the evidence given before him, this would seem to have been the effect of what she did; that by making a small portion of the tract pay the mortgage debt, which was an incumbrance upon the whole tract, prior in date to the lien of her judgment, and might at a forced sale have swept away the whole tract to pay it. It was in fact a charge upon the whole tract of land, and from all that appears in the case, the land was the only resource

from which payment of it could be obtained, so that Mrs. Wilcox had no alternative which seemed so well suited to preserve at least a portion of the land as a security for the payment of her judgment, as that of releasing the thirty acres from the lien of it. It may, therefore, be very properly considered an improvement of her security, instead of a diminution of it.

Decree affirmed.

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*Facts and part of opinion omitted.

See also Provan v. Percy, 11 La. Ann. 179.

Note: A surety will not be released by the substitution, by the creditor of one collateral security for another, when made in good faith and apparently for the benefit of all concerned, and when it is not shown that the substituted security is worth less than the judgment. State Bank v. Smith, 155 N. Y. 185, 49 N. E. 680; Berlin Nat. Bank v. Guay, 76 N. H. 216, 81 Atl. 475.

A bank holding the note of its depositor for which another is surety is under no obligations to the surety to apply the deposits of the maker to the payment of the note. The bank may honor the checks of the maker of the note, after default, for the entire deposit, and still hold the surety. Davenport v. State Bank Banking Co., 126 Ga. 136, 54 S. E. 977, 8 L. R. A. (N. S.) 944n, 115 Am. St. 68n, 7 Ann. Cas. 1000.

SECTION 10. RELEASE OF COSURETY

SCHOCK *v.* MILLER

10 *Pa. St.* 401 (1849).

Debt against the administrators of Hertzler, on a joint and several bond executed by Hertzler and Funk as sureties, and by Wright as principal. On the trial, the defendants gave in evidence an indorsement on the bond, signed, but not sealed, by the plaintiff, which recited a receipt of a sum of money from Funk, one of the sureties, being one-half of the amount due on the bond, as and for his full share and part of the obligation. It then continued: "And I do hereby release him, the said Henry Funk, his heirs, executors, and administrators, of and from all claim and demand from or (by) reason of the within obligation."

The plaintiff then offered to prove, by the subscribing witness to this indorsement, that it was not intended by the parties to release Hertzler, but only to exonerate Funk. The court (Lewis, P. J.) rejected the evidence, and directed a verdict for defendant.

Rogers, J.: Where the effect is to increase the responsibility of those who are not included in its terms, the release of one or more joint, or joint and several debtors, operates as a discharge of all the others from the obligation of the debts. But, when the effect will be, not to increase the responsibility of the other obligors, it

operates as a release pro tanto only. Thus, a release of the principal debtor discharges the sureties, because it throws the burthen of the debt on the sureties, who, as between the obligors, are not liable for the debt, and is, therefore, an injury to them; but the release of one or more of the sureties does not discharge the principal debtor, for the plain reason that he is primarily liable for the debt, and the release of the surety may injure the creditor, but can not, by any possibility, prejudice him. These principles are supported by reason and authority. Thus, the release of a principal debtor will discharge a mere surety, but the release of one cosurety will exonerate the other only to the extent which the releasee would otherwise be compelled to pay: Ex parte Gifford, 6 Ves. 805. And in Mortland v. Himes, 8 Barr. 265, which recognizes Ex parte Gifford, it is ruled on the principle above stated, that a release of the surety does not exonerate the principal debtor. Mr. Justice Bell, who examines the cases bearing on the point, puts the question on the only rational principle: that whether the release of one joint, or joint and several debtor, discharges the others, depends on the question whether the effect will be to increase the responsibility of the other debtors. If not, though effective as a release, it is never permitted to work a dissolution of the contract as to the party not released. In Pitman on Surety, 40 Law. Lib. 178, the law is thus stated: "As the reason for discharging a surety from his liability when time has been given to the principal debtor, is, that the creditor has done an act by which the surety is or may be injured, any agreement entered into between the creditor and the principal, by which the remedies of the sureties are not determined or effected, and still less by which they are accelerated, as it can not prejudice the surety, so it shall not discharge him." So, in Whitehill v. Wilson, 3 Penna. 405, it is said, if the creditor releases the principal from the payment of the debt, he thereby releases the surety entirely. But, if he releases the principal from a part, he only releases the surety pro tanto, and there is not even a shadow of reason why it should be considered as a release for any more. Now, granting the instrument to be a technical release, does it discharge the cosurety from all liability, or pro tanto only? We think the latter to be clear, on reason, and on the authorities already cited. The discharge of a surety by a creditor has not the effect of the discharge of the principal, without reserve, and therefore a cosurety is not discharged. In 1 Stor. Eq. Juris. 498a, the learned commentator remarks: "That it seems now clearly established at law, that a release or discharge of one surety by the creditor, will operate as a discharge of all the other sureties, even though it may be founded on a mere mistake of law; but, it may be doubted whether the same rule will be allowed universally to prevail in equity." Indeed, circumstances may exist, in which even a release of the principal might not release the surety from the debt, when

it was clear, from the whole transaction, that it was intended the surety should remain bound. Also, in this action, commenting on Lord Denman's opinion in the case of Nicholson v. Revill, 4 A. & E. 675, Mr. Justice Story remarks: "It is, however, to be remembered that his lordship was here dealing with the question at law, but, it by no means follows that, because a security is extinguished at law, therefore it is extinguished in equity, if it is the clear intention of the parties that it should not be extinguished. Thus, an agreement between husband and wife, without the intervention of trustees, will be enforced in equity, although void at law; for equity will not suffer the intention of the parties to be defeated by the very act which is designed to give effect to such a contract." Whatever, then, may be the effect of a release at law, it, in equity (and equity is part of our law), is a discharge pro tanto. And why should the law be otherwise? For this, no rational reason has or can be given. In this case it is clear, that the act of the creditor, so far from being an injury, is a benefit to the cosurety, for it relieves him from the payment of a moiety of the debt, the whole of which he might otherwise be compelled to pay. If it be a prejudice to any one, it is the creditor; but of this, surely, the cosurety has no right to complain. Why the creditor agreed to release one of the sureties upon payment of his share of his debt, we are not informed; nor is it material, as we are satisfied he had the right without the consent, or against the consent, of the cosurety, to do so, without effecting or impairing his claim, except to the extent of moiety of the debt. The executors of Hertzler can not be compelled to pay more than they are equitably bound to pay on the insolvency of the principal debtor, viz., a moiety of the debt. To that extent, and to that extent only, they have a defense to the action.

The principle which rule this case is decided in Ex parte Gifford and Mortland v. Himes, already cited; the only difference in the latter being that it was the principal who relied on the release as a defense. In this it is the cosurety, the principal being insolvent. In principle, it is impossible to distinguish the cases.

Judgment reversed, and a venire de novo awarded.

Accord: Smith v. State, 46 Md. 617.

SAMUEL ALFORD, JR., *v.* CHESTER BAXTER

36 *Vt.* 158 (1863).

Assumpsit on a promissory note. Plea, the general issue and notice. Trial by court, by consent of parties, December term, 1862, Barrett, J., presiding.

The plaintiff read the note declared on without objection, signed by Isaac Green as principal, and Geo. B. Green, Jo. D. Hatch and

Chester Baxter as sureties, and indorsed to the plaintiff by the payee Albert Brown, guardian, without recourse; and rested.

The defendant read, without objection, a discharge from Brown the payee, to Hatch, and proved that it had been duly executed and delivered. It was conceded that Brown at the time of the execution and delivery of this discharge was the holder of the note. The plaintiff then read in evidence an instrument appended to the discharge in the following words:

"Having examined the foregoing contract, I hereby consent and ratify the same and hereby bind myself to discharge said Hatch from all liabilities the said Hatch may be under to me as a co-indorser as fully as the said Brown has discharged said Hatch.

"In witness whereof, I hereunto set my hand and seal this 6th day of August, A. D. 1861. (Signed) CHESTER BAXTER (L. S.)

"In presence of Hiram Harlow."

The defendant contended that the discharge was effectual to discharge the whole debt and that the defendant was entitled to recover his costs.

The plaintiff insisted that the note was not so discharged, and that the plaintiff was entitled to judgment.

The court rendered judgment for the plaintiff to recover the balance of the note which was not paid by Hatch, being two-thirds of the note with the interest thereon. Exceptions by the defendant.

PECK, J.: The only question is whether the release executed by Brown to Hatch, one of the three sureties, in connection with the defendant's assent and agreement annexed thereto, releases the defendant, another surety, from all liability as the defendant claims, or only from one-third of the note, as the plaintiff claims. The defendant claims that at common law the release operates to discharge the defendant from all liability, and that the statute of 1855, providing for the discharge of one or more of several joint obligors or promisors, without impairing the right to secure the residue of the debt against the others, is confined to the discharge of one or more of several principals and does not extend to the case of a discharge of one or more of several sureties.

The first section in general terms, without limitation or qualification, provides that any creditor who has or may have a debt or demand against a copartnership, or several joint obligors or promisors, may discharge one or more of such copartners, obligors or promisors, without impairing his right to recover the residue of his debt or demand against the other copartners, obligors or promisors. There is nothing in the language of this section which necessarily restricts it to principals. In case of a demand against a copartnership, if one member of the firm is principal the others generally would be, but not necessarily. One might, by authority from the others, pledge the name of the copartnership for his individual debt, in which case the others would be his sureties. So all the

members of the firm may be surety under the copartnership name, as well as an individual. But even if from the word copartners principals only are contemplated, the word is only used as an instance, and does not have the effect to limit or restrain the meaning of the more general words, "obligors or promisors." Sureties on a promissory note are as much joint promisors as are the principals. All are joint promisors as between them and the creditor; and it is the relation of debtor and creditor that the statute in this section is dealing with, rather than the relation of the debtors with each other. The second section provides how the suit may be brought to recover the residue of the debt, that is, by alleging by whom the contract was made and to whom a discharge has been executed. Thus far there is nothing in the language of the act limiting its application to the discharge of principals. The statute is remedial, and was enacted to remedy or abrogate a harsh rule of the common law that often worked injustice. It should therefore be construed liberally, so far as it can be, consistently with its language, to effect the purpose the legislature had in view. It should be so construed as to advance the remedy and cure the mischief, so far as the language will permit. If the words are susceptible of two interpretations, that construction should be adopted which most effectually cures the mischief intended to be remedied. No reason is perceived why the purposes of justice do not require that when a debt falls on several sureties, the creditor should not have the same right to release one on his paying his share, that he has to release one of several principals, without thereby discharging the others from their liability to pay their just proportion. The statute obviously contemplates its application to contracts on which there are sureties, as appears from the language of the third section; but still this is not conclusive against the defendant's construction limiting it to cases where a principal is discharged. But unless there is something in the language of the third section which limits the act to cases where a principal is discharged, we see no reason why it should receive such a limited construction. In fact the mischief of the common-law rule, if it is as claimed by the defendant's counsel, seems to be greater as applicable to the discharge of a surety, because under that rule the release of the surety on a joint contract, who as between him and the principal ought to pay nothing, releases the principal who ought to pay the whole debt. The third section provides that, "said discharge shall have the same effect for all purposes, and as to all persons, as payment by the party discharged, of his equal part of the debt, according to the number of the debtors aside from sureties." This is the provision mainly relied on in support of the construction contended for by the defendant. It is urged that the expression, "according to the number of debtors aside from sureties," shows that the statute was intended to apply only to the discharge of a principal. The phrase,

"aside from sureties," was not inserted for the purpose of preventing the application of the statute to cases of the discharge of one or more of several sureties, but for a different purpose. The preceding part of the section having provided that the discharge should not operate to release the debt beyond the amount of the share of the party discharged, and having referred to the number of debtors as the criterion of this apportionment, it was necessary to provide that sureties should not be counted for this purpose. This is manifestly just; for if one of two principals is discharged, it ought to operate to discharge half the debt even if there are sureties, and if the principals are all discharged it ought to be a discharge of the sureties if the creditor knew the fact that they were sureties. The word sureties in this section may be construed to mean, sureties of the party discharged. If this is the sense in which the word is used, the language of the statute harmonizes with its obvious intent. As the defendant is not a surety for Hatch, who was discharged, and as the same relation exists between the sureties as among themselves, that exists between joint principals (each being bound to pay his proportion according to their numbers), we see no reason why the release of one of three sureties should release the other sureties beyond the amount of the share of that surety to pay as between him and his cosureties.

But if we are wrong in supposing the word sureties to mean only sureties of the party discharged, and if the language of the third section is not broad enough to embrace cases of the discharge of sureties, the result is the same; for the most that can then be said is that in providing what the effect of a discharge may be, the third section has omitted to specify the case of the discharge of one of several sureties in an action against another surety. This omission can not have the effect to exclude such case from the operation of the first section, which gives the right to the creditor to discharge one or more obligors or promisors, "without impairing his right to recover the residue of his debt or demand against the other copartners, obligors or promisors." The first section gives the right, and upon no reasonable construction is it taken away by the third section.

Under this construction if one or more principals be discharged it discharges the debt in proportion as the number of principals discharged bears to the whole number of principals. If all the principals be discharged, it operates to discharge all the sureties. If one of the sureties be discharged, it operates, in an action against the other sureties, as a discharge of the portion of that surety to pay as between him and the other sureties, according to the number of sureties. The discharge of a surety does not operate to discharge a principal, because as between the principal and surety the portion of the surety to pay is nothing. If we adopt the construction claimed by the defendant, that the statute does not apply to

the case of discharge of a surety, then the discharge of a surety operates as a discharge of the whole debt, and releases not only the other sureties but also the principals, if the rule at common law is as the defendant claims. We can not suppose the legislature intended that a creditor might discharge one of two principals and enforce the collection of the other half of the debt against the other principal or against the sureties, and yet if he discharged a surety he should have no remedy against the principal or surety for the residue. The object of the statute was to allow the creditor in the collection of the debt, to apportion the debt among those jointly liable, whether principals or sureties, according to the duties and obligations of the debtors respectively as among themselves. The construction we put upon it will generally, if not in all cases, effect that object. It allows the creditor to deal with the debtors, respectively, in the same manner that the debtors are bound to deal with each other in reference to the debt. As there were three sureties on the note, and as the amount paid did not exceed one-third of the debt, the release to Hatch operates to release the defendant from one-third of the debt only, and the county court properly rendered judgment for the plaintiff for the other two-thirds. We are not prepared to say whether, independent of the statute, the release to Hatch and agreement of the defendant executed at the same time, would have had any greater effect.

Judgment affirmed.

Accord: Walsh v. Miller, 51 Ohio St. 462, 38 N. E. 381.

Where the creditor by valid contract extends the time of payment as to one surety, the other surety is discharged to the extent of the loss of his right to contribution. Ide v. Churchill, 14 Ohio St. 372.

Contra: Sherman County v. Nichols, 65 Nebr. 250, 91 N. W. 198.

SECTION 11. DISCHARGE BY PAYMENT

SPURGEON *v.* SMITHA ET AL

114 *Ind.* 453, 17 *N. E.* 105 (1888).

Elliott, J.: The appellant's complaint is founded on a promissory note executed by the appellees. The second paragraph of the answer of the appellees avers that they executed the note as the sureties of William R. Smitha; that the appellant knew the capacity in which they executed the note; that their principal paid him two hundred and forty dollars; that the appellant thereupon reloaned the remainder of the sum due him to William R. Smitha, without the knowledge or consent of the appellees.

The second paragraph of the answer avers the fact of suretyship and the appellant's knowledge, and also avers that after the note

matured the principal tendered to the appellant the amount of the note; that he accepted two hundred and forty dollars in part payment of the note, and agreed with William R. Smitha that he should retain the remainder, paying the interest thereon for one year.

The third paragraph of the answer is substantially the same as the second.

The fourth paragraph is a plea of payment.

The contract made by the creditor and principal, wherein the former, after accepting part payment of the debt, reloaned the latter the remainder of the money due, released the sureties. Sureties, as is well known, have a right to stand upon the letter of their contract, and if a creditor assumes to change the contract he releases them from liability. According to the averments of the first paragraph of the answer, the creditor, knowing that the appellees were sureties, made a radical change in the contract by reloaning part of the money due him to the principal, and he has lost all claim upon the sureties.

The averment that the money was reloaned to the principal debtor for one year is the averment of a fact, and not of a mere conclusion. Taylor v. Lohman, 74 Ind. 418 (422). The word "reloan" describes a fact—the act of lending money a second time, or oftener. The evidence required to establish the fact is a very different thing from the fact itself, and not only need not be pleaded but can not be pleaded without a violation of the rules of pleading.

The act of the creditor, in refusing the money tendered him by the principal debtor, released the sureties. The sureties had a right to rely upon the performance of the contract by the principal and upon the acceptance of performance by the creditor. This much was implied in their contract, and as the creditor declined to accept performance when tendered him, he departed from the contract, and released the sureties. Post v. Losey, 111 Ind. 75 (60 Am. R. 677.) A creditor impliedly undertakes that the debt may be paid at maturity, and if he refuses to accept the money due, when tendered him, he breaks this implied undertaking, and loses his claim upon the sureties, for the act is injurious to them.

A creditor who does any act inconsistent with the terms of the contract, or prejudicial to the interests of sureties, releases them from liability. 1 Story Eq. Jur., sections 324, 325. The refusal to accept the money tendered was, it is very clear, inconsistent with the terms of the contract, for the terms of the contract made it the duty of the creditor to accept payment when tendered him. It was also an act prejudicial to the interests of the sureties, for, if the creditor had accepted payment, they would have been effectually discharged. The authorities fully sustain our conclusion, although the reasoning upon which some of the courts proceed is somewhat different from that pursued by us; their reasoning having for its basis the theory that the refusal of the creditor to receive the

money when tendered is a fraud upon the sureties. Sears v. Van Dusen, 25 Mich. 351; Donley v. Camp, 22 Ala. 659; White v. Life Association, 63 Ala. 419 (35 Am. Rep. 45); McQuesten v. Noyes, 6 N. H. 19; Sailly v. Elmore, 2 Paige 497; Joslyn v. Eastman, 46 Vt. 258; Johnson v. Ivey, 4 Cold. 608; Hayes v. Josephi, 26 Cal. 535; Curiac v. Packard, 29 Cal. 194; Brandt Suretyship and Guaranty, section 295; Baylies Sureties and Guarantors, 273; Fell Law of Guaranty and Suretyship, 520.

The case of Clark v. Sickler, 64 N. Y. 231, is not supported by authority, and, as Mr. Brandt shows, is not sound on principle. In an early case in our own reports, a doctrine very different from that asserted in Clark v. Sickler, supra, was declared.

In the case decided by this court, that of Musgrave v. Glasgow, 3 Ind. 31, the court said: "If Musgrave had actually placed the money in the hands of Glasgow for the payment of the notes, and afterward received it back from him as a new loan, under the circumstances detailed, it can not be doubted that this would have been a payment, and bond would have been discharged. And if the parties intended to waive the formality of passing the money from one to the other and back again, but really to consider the transaction as a payment and new loan, we do not see any good reason why it might be so regarded by the jury."

It seems clear to us that where the creditor declines to receive the money offered him he elects to change the contract, for it is as much part of the contract that he should accept the money when tendered as that the debtor should pay it. Having elected to depart from the contract, he really made a new one, binding only the party consenting to it, and that was the principal debtor.

In the case of Wilson v. McVey, 83 Ind. 108, cited by the appellant, this court referred to Mr. Brandt's work and approved the rule as stated by him, but held that the case was not within the rule.

The court gave the jury this instruction: "It is a well settled rule of law that sureties are not to be held beyond the precise terms of their contract; they have a right to stand upon the very terms of their contract, and if they do not assent to any variation of it, and a variation is made, it is fatal."

There was no error in giving this instruction, for it states the law correctly, and was applicable to the evidence.

The evidence fairly supports the verdict, for it supplies ample grounds for the inference that the money was offered to the appellant by the principal debtor, and that the offer was declined, except as to part of the debt, and the debtor requested to keep the remainder. One of the witnesses says that the appellant admitted that the principal debtor "had a big roll of money in his sleeve, and pulled it out and offered to pay the balance." Another witness testified that the appellant said to him that "William R. Smitha had paid him $200 and interest, and told him that he had the rest of

the money, and he," the appellant, "said that I would rather he would keep the money and pay interest. He, Spurgeon, said it was not a good tender when he took out the money and offered it to him." It was said by another witness "that Spurgeon told William R. Smitha that he did not want all the money; he wanted to keep it at interest; that he," William, "offered him the money, but he said he did not want it, that he would rather have the interest."

It is true that the evidence does not show a strict tender, but it does show a waiver of a formal tender. The money was present and was offered the appellant, and it was by his own affirmative act that a formal tender was prevented. If there had been no production of the money, and nothing more than a bare offer to pay the debt, it may be that the offer would not discharge the sureties; but here the offer was accompanied by the production of the money, and there was both the willingness and the ability to make immediate payment.

We do not hold that a mere offer to pay will discharge the sureties; but we do hold that where the money is actually produced and an unconditional offer made to pay it at once to the creditor, and he refuses to accept it, and asks the debtor to retain it, the sureties are discharged. Where the money is actually produced, and the creditor does not object to the tender but requests the debtor to retain the money, he can not subsequently insist that the tender was insufficient. The act of the creditor makes the offer of the money produced by the debtor a sufficient tender, for he so characterizes it by his act.

Judgment affirmed.

Accord: Smith v. Old Dominion Building &c. Assn., 119 N. Car. 257, 26 S. E. 40.

GILBERT N. HARDING, RESPONDENT, *v.* WILLIAM L. TIFFT, IMPLEADED, ETC., APPELLANT

75 *N. Y.* 461 (1878).

Appeal from judgment of the general term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was upon a promissory note for $500, made by defendants Skinkle & Howlet, and indorsed by defendant Tifft, for their accommodation. The answer set up a payment of $275.

The facts appear sufficiently in the opinion.

RAPALLO, J.: The point upon which the appellant relies for the reversal of the judgment in this action is, that on the trial the court excluded the evidence of the fact that the sum of $275 which was

paid in June, 1873, by Skinkle to the plaintiff, had been raised by Skinkle by the use of the name of the defendant as an accommodation indorser, for the purpose of being applied toward the payment of the note in suit. It was not proved or offered to be proved that knowledge of this fact was communicated to the plaintiff. Skinkle testified that in the spring before the payment he told the plaintiff that he would make a payment on a $400 note, which the plaintiff held against the firm of Skinkle & Howlet without any indorser, if he could get it out of their business, and that he would pay on the note in suit, indorsed by the defendant, if he got it on a note indorsed by him, and that four or five days before the payment he told the plaintiff that he had found where he could get the money to pay on the note in suit. But he testified that he could not say that he told the plaintiff how or on whose indorsement he was going to get the money, and he does not say that he ever told plaintiff how he got it.

Skinkle further testified that when he made the payment he told plaintiff that he had come to pay $275 on the note indorsed by the defendant. That plaintiff took the money, counted it and took out a paper which the witness supposed was the note, and wrote on the back of it. The plaintiff contradicted Skinkle's statements to the effect that the payment was made on the note in suit, and gave evidence tending to show that it was made on the $400 note; he also testified that at the time of the payment he indorsed it on the $400 note in presence of the defendant, but that he did not know whether the defendant noticed the note. That he did not know that the money had been raised on the defendant's indorsement. The $400 note was produced at the trial, bearing the indorsement of the payment.

It is conceded that if the money paid to the plaintiff had been raised on the credit of the defendant for the purpose of being applied on the note indorsed by him, and this fact was communicated to the plaintiff, he would have bound himself by accepting the money to apply it on that note. But in the absence of any such knowledge, it is claimed on the part of the plaintiff that he had the right to apply the money paid him by Skinkle, to the unindorsed note, unless Skinkle directed that it be applied on the note in suit, and that the fact that it had been raised by Skinkle on the defendant's indorsement, if unknown to the plaintiff, would not affect that right.

The question whether Skinkle directed the payment to be applied on the note in suit, as stated by him in his testimony, was submitted to the jury and their verdict establishes that no such direction was given. The evidence as to the means by which Skinkle raised the money was not material on that issue. But it is claimed by the defendant that, assuming that no direction was given by Skinkle to apply the payment of any particular note, the fact that the money

had been raised on a note indorsed by the defendant for the express purpose of being paid on the note in suit, entitles him now to have it thus applied notwithstanding the application actually made by the plaintiff at the time. It is not disputed that a creditor having two demands against a debtor may apply a payment received from the debtor to either of the demands, at his election, provided no direction is given by the debtor, and the verdict establishes that no such direction was given in the present case to apply the payment on the note in suit. But it is contended that the right of the creditor to make the application is subject to the condition that such application be not inequitable, and such is the language used in some of the authorities cited.

The equities referred to, however, are usually equities existing between the debtor and creditor, and I have found no case recognizing those arising out of transactions between the debtor and third persons, of which the creditor has no notice. The mere fact that there is a surety for one of the debts, does not preclude the creditor from applying a payment thus received, to the debt for which he has no security. (Allen v. Culver, 3 Den. 285; Stone v. Seymour, 15 Wendt. 20.) If the money had been raised by the debtor by the aid of indorsement of the surety, given for the express purpose of enabling the debtor to raise funds to pay the secured debt, and these facts had been communicated to the creditor, he would not be permitted, even with the consent of the debtor, to misapply it. But it can hardly be disputed that if the debtor brought money thus raised, to the creditor, and paid it to him expressly upon the unsecured debt, without disclosing the means by which the money had been raised or any agreement as to its use, the payment would be valid. I think the same result follows when the debtor by omitting to specify on which debt the payment is to be credited, authorizes the creditor to apply it to either, and the creditor exercises this option. The money belongs to the debtor and where the creditor is ignorant of any duty on the part of the debtor in respect to it, he may receive and apply it as if no such duty existed. If no application had been made by either party, and the duty were cast upon the court of making the proper application, the equities of the surety would doubtlessly be considered. But where the application has been made by the creditor, in accordance with his apparent legal right, and in ignorance of any fact which should prevent him from making such application, I do not think he is bound to change it on the subsequent disclosure that a third party had an interest in having it otherwise applied and that the debtor had violated a duty to such third party in not directing such application. The application made by the creditor can not be said to have been inequitable if no facts were brought to his knowledge at the time, showing that he ought not to make it; it would create great confusion in commercial dealings, to hold that after the lapse of time, and when the position

of the parties may have been changed by such a payment, the transaction could be reopened and the creditor obliged to revive an unsecured debt which he had treated as paid, and apply the payment on a debt for which he had ample security. The loss if any sustained by the surety in such a case results from the act of his principal in whom he placed confidence, and not from any improper act of the debtor. It does not appear that the plaintiff was ever appraised until the trial of this action, of the allegation as to the means by which the money had been raised. He had the right in the meantime to repose upon the payment of the unindorsed note, and if he had attempted to collect that, the fact of the payment, and the indorsement of it on that note would have been a great defense. The defense set up in the answer in this action and testified to at the trial was the express payment on the note in suit. If that was true, the evidence as to means whereby Skinkle raised the money was immaterial, and it was excluded on that ground. But in any aspect of the case it was properly excluded.

The judgment should be affirmed.

All concur, except Miller and Earl, JJ., absent.

Judgment affirmed.

PETTY *v.* COOKE

L. R. 6 *Q. B.* 790 (1871).

Declaration by payee against maker of a promissory note for £100, with interest, payable on demand, and on accounts stated.

Third plea, that the promissory note was made by the defendant and one S. D. Steele jointly, and whereby they jointly and severally promised to pay the moneys therein mentioned, and that the accounts in the said declaration alleged to have been stated were so stated of and concerning the money due upon the promissory note, and that the money found to be due and the moneys due upon the note are the same, and not different moneys; and that after the note became due, and before action, S. D. Steele satisfied and discharged the plaintiff's claim by payment.

Fifth plea, on equitable grounds, that the promissory note was made by the defendant and one S. D. Steele jointly, and whereby they jointly and severally promised to pay the moneys therein mentioned, and that the accounts alleged to have been stated were so stated of and concerning the moneys due upon the promissory note, and no other money whatsoever; and the money found to be due, and the moneys due upon the note are the same and not different moneys. And that the defendant made the note jointly with S. D. Steele, for the accommodation of S. D. Steele, and as his surety,

only to secure a debt due to the plaintiff from S. D. Steele alone, of which the plaintiff at the time of the making of the note and when he first received the same, had notice; and that except as aforesaid there never was any value or consideration for the making or payment of the note by the defendant. And that after the note became due, and whilst the plaintiff was the holder of the note, S. D. Steele paid to the plaintiff, and the plaintiff then received from S. D. Steele money exceeding the amount due upon the note in payment of the same, and which payment then operated as a full satisfaction and discharge of the plaintiff's claim upon the note, as against the defendant, and of all the moneys, causes and rights of action against him in respect thereof.

Replication, on equitable grounds, to the third and fifth pleas: that the payments, in the pleas respectively mentioned, were one and the same identical payment, and not other or different payments. And that S. D. Steele, at the time when he made such payment, as in the third and fifth pleas respectively mentioned, was a trader within the meaning of the laws and statutes concerning bankruptcy in insolvent circumstances; but without any knowledge of such circumstances on the part of the plaintiff; and S. D. Steele made the payment to the plaintiff voluntarily and without any pressure or demand on him, S. D. Steele, for the payment of the same; and such payment was made by S. D. Steele in contemplation of bankruptcy or of a quasi bankruptcy, by the execution by him, S. D. Steele, of a trust deed for the benefit of his creditor, within the true intent and meaning, and according to the clauses of the Bankruptcy Act, 1861, relating to trust deeds for the benefit of creditors, and for the purpose of defeating the provisions of the Bankruptcy Act, 1861, and the other statutes concerning bankrupts. And the plaintiff was then wholly ignorant that such payment was so made in such contemplation as aforesaid. And that after the making of such payment by S. D. Steele to the plaintiff, a deed or instrument of assignment was duly made and entered into between the said S. D. Steele, as debtor, and his creditors, and certain persons as trustees on behalf of the creditors of S. D. Steele, being a trust deed for the benefit of the creditors of S. D. Steele, within the true intent and meaning and according to the clauses of the Bankruptcy Act, 1861, relating to trust deeds for the benefit of creditors, and under which deed or instrument (all things necessary in that behalf, according to the statutes in such case made and provided, having happened and been done) the right to avoid and rescind, as a fraudulent preference, the payment of the note so made by S. D. Steele to the plaintiff, and to recover from the plaintiff, the amount thereof became and was vested in the trustees as aforesaid. And that after the execution and registration of the deed or instrument, and after the right to avoid and rescind the payment by S. D. Steele to the plaintiff, so became vested in the trustees,

they did elect to avoid and rescind, and did avoid and rescind, the payment by S. D. Steele to the plaintiff, and called upon and required the plaintiff to pay the money so received by him from S. D. Steele in payment of the note to them. And that afterward, and in consequence of the election, and so being called upon and required by the trustees to pay the money so received by the plaintiff from S. D. Steele in payment of the note, he paid the same money to the trustees, and within a reasonable time after such payment gave notice thereof to the defendant. And that the payment by S. D. Steele to the plaintiff under the circumstances stated in his replication, and no other, was and is the identical payment mentioned by the defendant in the third and fifth pleas respectively. And that such payment did not operate in satisfaction and discharge of the causes of action in the declaration mentioned, as in the said pleas respectively alleged.

Demurrer, and joinder in demurrer.

*Herschell, in support of the demurrer: The replication is no answer to the pleas. The creditor by accepting payment of his debt from the principal debtor, has discharged the surety. Payment under a fraudulent preference is not void but voidable; when the payment was made it was not a void payment, and there was a time when the surety could have pleaded it as a discharge. There was also an interval of time during which the surety had lost the right to step in and become the creditor of the principal debtor; the surety is prejudiced in having lost that right; the payment by the principal debtor is therefore a good payment so as to discharge the surety. Any contract between the creditor and the principal debtor prejudicial to the rights of a surety discharges the surety.

Blackburn, J.: Is there any case which says that an innocent act unconsciously done discharges the surety? In Hulme v. Coles, 2 Sim. 12, the vice-chancellor says: "The principle of discharging a surety by the giving of time by the creditor is a refinement of a court of equity, and I will not refine upon it." I also think we ought not to refine upon that doctrine.

The contract of suretyship between the three parties, the principal debtor, the creditor, and the surety, gives certain rights to each, and one of the rights of the surety is to step in and pay off the creditor and take his place; if by an agreement between the principal, and the creditor the surety is deprived of this right he is discharged, and it is immaterial whether the act is unconsciously done or not. The facts in Pritchard v. Hitchcock, 6 M. & G. 151 (E. C. L. R. Vol. 46), were similar to the present case, but equitable pleas could not at that time be pleaded, so that the equitable question as to the rights of the surety were not discussed.

Forbes, contra. The replication is a good answer to the pleas.

The surety, at the time of taking upon himself his liability, contracts that the creditor shall receive valid payment of his claim against the principal debtor. If there is no valid payment the contract of the surety remains unfulfilled, and the surety is not discharged. A payment which, at the time it is made, contains the seeds of avoidance, and it is subsequently avoided, is not a valid payment. The creditor did nothing inequitable in receiving payment, and the acceptance of the money was apparently not an act prejudicial to the surety, but for his benefit. In Newington v. Levy, Law. Rep. 5 C. P., at p. 612, Wiles, J., says: "It must often have happened that a voluntary payment, good at the time, as extinguishing the debt, has been rendered void by matters subsequent, as in the event of bankruptcy of the debtor, and an election by his assignees, to treat the payment as a fraudulent preference, and it has never been successfully contended that the debt did not thereby revive." This passage seems to be decisive of the case. Moreover, Pritchard v. Hitchcock, 6 M. & G. 151 (E. C. L. R., Vol. 46), is precisely in point.

Herschell, in reply.

Blackburn, J.: It seems to me clear, both in equity as well as law, that the plaintiff is entitled to sue the surety, and that there is nothing stated in the pleadings which has discharged the latter from liability. As early as Rees v. Barrington, 2 Ves. 540, 2 Wh. & T. L. C. (Eq.) 3d ed. 887, a case decided in 1795 by Lord Loughborough, it was held, on what certainly seems artificial reasoning, that where time is given by a creditor to a principal debtor without the consent of the surety, the surety is in equity discharged, however short the time may be, on the ground that he is thereby deprived of his right on paying off the creditor to sue the principal debtor. Lord Eldon, also, in Samuel v. Hawarth, 3 Mer. 272, cited in the notes to Rees v. Berrington, 2 Wh. & T. L. C. (Eq.) 3d ed. 895, says, "The rule is that if a creditor without the consent of the surety gives time to the principal debtor, by so doing he discharges the surety, that is, if time is given by virtue of positive contract, between the creditor and the principal—not where the creditor is merely inactive. And in the case put the surety is held to be discharged, for this reason, because the creditor by so giving time to the principal has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, because he, in fact, can not have the same remedy against the principal as he would have had under the general contract. * * * It has been truly stated that the renewal of these bills might have been for the benefit of the surety, but the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is or is not for his benefit. The creditor has no right, it is against the faith of his contract to give time to the principal, even though manifestly for the benefit

of the surety, without the consent of the surety." I think it impossible to read the principle laid down by Lord Eldon without thinking that it is based upon highly technical reasoning, however accurate it may be. It is clear that a creditor who gives time to a principal debtor without reserving his right against the surety, and alters the rights of the surety, discharges him; but that time given by a creditor, which in numberless cases does not injure the surety, should discharge him, is to my mind not justice, although established by courts of equity. The ground, however, on which the doctrine is based, is that by giving time to the principal debtor the creditor does an act which is against good faith, and injurious to the surety; that doctrine can not apply to the present case, for the creditor accepted money which he had no right to refuse, and the acceptance of which he had no means of knowing would injure the surety. He therefore did no act injurious to the surety, and the surety is not discharged. I think Pritchard v. Hitchcock, 6 M. & G. 151 (E. C. L. R., Vol. 46), is in point.

LUSH, J.: I am of the same opinion. The rule of law and equity with regard to the rights of a surety is the same. I do not entertain the slightest doubt that the act of the creditor which discharges the surety must be an act involving something inequitable at the time it is done and which interferes with the right of a surety; an acceptance of money from the debtor, which the creditor thought at the time he accepted it was a good and valid payment, can not therefore discharge the surety. The creditor, under present circumstances, could not have refused to accept the money; its acceptance was an advantage, not an injury, to the surety.

HANNEN, J.: I am also of the same opinion. Lord Eldon puts it that the surety is discharged when the creditor has done anything which is "against the faith of his contract." How can it be against the faith of his contract for the creditor to do that which it was his duty to do, namely, to receive payment? It turned out afterward that the payment was not a good payment, and therefore the surety is not discharged.

Judgment for the plaintiff.

Accord: Northern Bank v. Farmers' Nat. Bank, 111 Ky. 350, 63 S. W. 604; Harner v. Batdorf, 35 Ohio St. 113.

EMERINE *v.* O'BRIEN

36 *Ohio St.* 491 (1881).

The original action was brought by the plaintiff in error, Andrew Emerine, against Thomas O'Brien, to recover the amount alleged to be due on a promissory note, executed by the defendant as surety of John T. Mitten. The petition alleged, in substance, "that on the 15th day of March, 1872, the plaintiff loaned to one John T. Mitten, $600; that Mitten then gave the plaintiff his promissory note for that amount, with the defendant, Thomas O'Brien, as surety thereon.

"That on the 16th day of May, 1872, about a month after the note became due, the plaintiff and O'Brien called on Mitten for payment; that Mitten then paid $100 on the note and gave a renewal note for $509, the balance then due upon the original note, and that Mitten then agreed to procure one Henry Fleck and one Frank Vogle to sign the renewal note as his sureties; that Mitten signed the renewal note and wrote upon it the names of Fleck and Vogle as his sureties, without their knowledge or consent; that this signing was done not in the presence of the plaintiff, and that the plaintiff had no knowledge or suspicion that the names of Fleck and Vogle were forged upon the note, until after the maturity thereof."

That the original note was joint and several.

Upon this state of facts, the plaintiff asked judgment against O'Brien for the balance remaining unpaid on the original note, after deducting all actual payments made upon it.

The answer admits these facts, except that the names of Fleck and Vogle were forged, and as a defense sets up that the transaction in which the renewal note was given did not occur in the presence of O'Brien, and that he knew nothing of it until some time after the renewal note had been given.

This alleged defense is denied in the reply.

On the trial Emerine testified as follows:

"On the 16th day of May, 1872, I went with the defendant, at his request, from Fostoria, in Seneca county, where we resided, to Upper Sandusky, in Wyandot county, Ohio, to collect the money on a note I then held against John T. Mitten and the defendant for $600. I called on Mitten for the money due on the note and he proposed to pay me $100 on it, and wanted thirty days' time on the remaining $509 then due on the note, and offered me Henry Fleck and Frank Vogle, merchant tailors, as sureties with him, on his note for $509, at thirty days. He paid me $100, and I renewed the balance with said Fleck and Vogle as his sureties. I did not know or suspect that the names of Fleck and Vogle were forged. The

original note of Mitten and the defendant was dated March 15th, 1872, and was written 'we or either of us promise to pay,' etc.

"I found that the names of Fleck and Vogle were forged some time in December, 1872, after Mitten had run away and left the country.

"The defendant and Mitten came to my office together, when I loaned him the money, on the 15th of March, 1872; O'Brien spoke for Mitten and wanted $600 for six months; I loaned Mitten $600, and he and O'Brien gave their note for it, payable about the 1st of April, 1872; O'Brien was surety on this note. When I took the new note for $509, at Upper Sandusky, I went there at O'Brien's request; he said Mitten was not worth anything. When I took the new note O'Brien and Mitten and myself were present; there was nothing done till O'Brien came in; this occurred in Mitten's storeroom. Mitten went out of the store to get the signatures of Fleck and Vogle on the note, and in a few minutes returned with the note with the names of Fleck and Vogle on it. I had no suspicion of any forgery, and I supposed I had good security for the balance due, so I delivered up the old note to the defendant, O'Brien, and upon his demanding it."

Proof was given that the names of Fleck and Vogle were forged, and written upon the note by Mitten.

The defendant testified as follows:

"I told Emerine he should collect the money from Mitten, as I was afraid he was not worth anything; and I hired a team and took Emerine up to Upper Sandusky for that purpose, when he made this new arrangement with Mitten. I was not present when Emerine and Mitten made the new arrangement. Emerine told me to stay on Main street and he would go and settle with Mitten so that Mitten and I wouldn't quarrel. I stayed out about half an hour, when Emerine came and called me into the store and said to me, 'I have settled this matter with Mitten, and you have nothing more to do with it.' I said, 'Then I am free?' and he told me 'Yes.' I said, 'Then give me up my note,' and he gave me my note and I took it and tore it up into small 'bits' there in the presence of Emerine and Mitten.

"I did not see the new note and knew nothing about how he had settled, until he told me on the way coming home.

"I intended to get an attachment for Mitten if the matter was not settled that day.

"I asked Emerine and urged him to go and collect the money from Mitten. I did not see Mitten pay any money; Emerine called me in the store. I did not see Mitten go out to get the note signed. Emerine handed my note to me when I demanded it, and Mitten was there. Emerine said to me, in Mitten's store, that he had arranged the matter with Mitten and I had nothing to do with it any more, and that I should not quarrel about it."

After the close of the argument, the plaintiff requested the court to instruct the jury:

"That if the plaintiff received of Mitten $100 in money, and his note of $509, with Henry Fleck and Frank Vogle as sureties thereon, and for the money thus paid and the note signed by Mitten, Fleck and Vogle, he surrendered and gave up to Mitten and to the defendant the original note, signed by Mitten and the defendant, and if the signatures of Fleck and Vogle to the note for $509 were forged upon said note, the plaintiff should recover of the defendant the amount remaining unpaid on the original note, after deducting from the full amount thereof any and all payments made on it in money."

Which instruction the court refused to give, but instructed the jury:

"That if the defendant took the plaintiff to Upper Sandusky in order to have this note, on which this action is brought, paid, or in some manner arranged, so that he (the defendant) should be no longer liable on it; and if, after the parties got there, the defendant took no part in getting this new note spoken of in the testimony, but the taking of it was the work of the plaintiff only, and the defendant had no knowledge as to whether the names of the sureties to it were genuine or not; and if, after this new note was taken, the note sued on in this case was delivered up to the defendant, as canceled, and he then acted on the faith, or fact, that he was no longer liable on it, then the plaintiff can not recover, and the defendant is entitled to your verdict, although the names of the sureties to this new note are forged.

"But if the defendant was present and took part in making the arrangement for the renewal of the note, and knew what was done, and how it was done, then, if the names of the sureties on the renewal note are not genuine, the plaintiff is entitled to recover." To which charge and instructions so given, the plaintiff then excepted.

The jury found for the defendant, and a judgment was rendered for him, which judgment, on error, was affirmed by the district court.

Boynton, C. J.: The court of common pleas gave entirely too much importance to the facts which were held sufficient to exonerate the defendant from liability on the note that he executed as surety for Mitten. The fact that the new note was a forgery left the liability of the defendant on the original note, to the extent that the new note was received in payment, entirely unaffected, unless there were circumstances attending the taking of the note, that relieved him from such liability. No principle is better settled or rests upon more solid reason, than that a forged note delivered in payment does not operate as a satisfaction or extinguishment of an antecedent debt or demand. Goodrick v. Tracy, 43 Vt. 314; Ritter v. Singmaster, 73 Pa. St. 400; Eagle Bank of New Haven

v. Smith, 5 Conn. 71; Markle v. Hatfield, 2 Johns. 455; Cook v. Barnes, 36 N. Y. 520; Scholefield v. Templer, 4 De Gex & J. 429; Stedman v. Gooch, 1 Esp. 3; 2 Par. on Notes and Bills, 205; 2 Daniel on Neg. Onst. 1274. The circumstances which the court held sufficient to relieve the defendant from the obligation to pay the amount remaining due on the original note, the new note being a forgery, were, that he took the plaintiff to Mitten's residence in order to have the note paid, or in some way arranged so that he should be relieved from liability thereon, took no part in obtaining the forged note, and had no knowledge whether the name of the sureties thereon were genuine or not, received his own note as canceled, and thenceforward acted on the faith that he was no longer liable thereon. The fact that he took the plaintiff to the residence of the principal maker in order to have the note paid, or some arrangement made by which he was to be relieved from further liability for the debt, is of no importance whatever, unless the arrangement made, or the new relation created, was a valid substitute for the original debt. Nor is it of the slightest importance that the defendant took no part in obtaining the new note. It is sufficient to preserve his liability, that the new note was void. It is not pretended that the plaintiff agreed to take the genuine note of Mitten, with the forged signatures of Fleck and Vogle as sureties, in payment of the note of Mitten and the defendant. He supposed and had the right to suppose that their signatures were genuine. There was an implied representation that the note was genuine in its delivery. In Goodrick v. Tracy, supra, the principal maker of the note sued on gave a new note with a forged signature of a surety thereon, and the names of the principal maker and surety on the original note were torn therefrom. The surety in that case had no part in obtaining the new note, yet in the disposition of the case that fact was not even noticed. The new note being void, his liability on the original note was held to be in nowise affected.

Nor does the circumstance that the note in the present case was delivered up as canceled affect the defendant's liability thereon. This was done in the belief, which the facts fully justified, that the new note was genuine. That it was not genuine was not the fault of the plaintiff. As was said by Lord Kenyon, in Puckford v. Maxwell (6 Term 52), "In cases of this kind, if the bill which is given in payment does not turn out to be productive, it is not what it purports to be and which the party receiving it expects it to be, and therefore he may treat it as a nullity and act as if no such bill had been given at all." Payment by a forged note or check is not different in its effect upon the liability of the debtor, than payment in counterfeit money. The pretended payment in either case is void, and leaves the original liability subsisting, although the written evidence of it may have been destroyed. Hughes v. Wheeler, 8 Cow.

77; Arnold v. Crane, 8 Johns. 79; Pierce v. Crafts, 12 Johns. 90; Young v. Adams, 6 Mass. 182; Gerwig v. Sitterly, 56 N. Y. 214; Alcott v. Rathbone, 5 Wend. 490.

The remaining circumstance to which the court seems to have attached some importance is, that the defendant may have acted on the faith that he was no longer liable on the note. It is, no doubt, a well-settled rule of law, that where the holder of the note assures the surety that he will look to the principal maker for payment, knowing the surety is about to obtain indemnity against his liability and who is thereby induced to relax or forego all efforts to obtain indemnity, which he otherwise would have obtained, the holder of the note would be estopped from insisting that the surety continued bound upon the note. This is the result of the cases cited in argument by counsel for the defendant, and they rest wholly upon the doctrine of estoppel.

It is clear to us, that the present case does not fall within the principle of these cases. The mere fact that the defendant supposed the note signed by him had been paid by the new note, and that he acted on the belief that he was discharged, does not relieve him from liability. It was evidently the understanding of both parties that the new note was genuine, and operated as payment of the first one. But this understanding was founded on a mistake of facts, for which mistake the plaintiff was no more responsible than the defendant.

It was no more the duty of the plaintiff to ascertain that the signatures of Fleck and Vogle were genuine, than of the defendant. Being a maker of the original note, and equally as liable thereon as Mitten, it was his duty to see that it was paid. Nothing short of payment, or a release by a valid contract, or by circumstances creating an estoppel, would cancel his obligation to pay, or discharge him from liability. The facts which, if found, the jury were told entitled the defendant to a verdict, considered either separately or as a whole, were entirely insufficient to defeat the plaintiff's right to recover, on his establishing the fact that the note received in payment was a forgery.

Judgment reversed, and cause remanded.

Bank v. Buchanan, 87 Tenn. 32, 9 S. W. 202.

SECTION 12. FAILURE OF CREDITOR TO DISCLOSE FACTS AFTER EXECUTION OF CONTRACT

PHILLIPS *v.* FOXALL

L. R. 7 Queen's Bench 666 (1872).

The judgment of Cockburn, C. J., Lush and Quain, JJ., was delivered by

Quain, J.: Only the opinion delivered by Quain, J., is given. This is an action brought by the plaintiff on a contract whereby the defendant guaranteed the honesty of one John Smith, a servant in the employ of the plaintiff, to the extent of £50. The contract is set out in the declaration, and recites the employment of Smith, and that it was his duty to collect money for the plaintiff and account to her for all sums of money so collected; and that the plaintiff had before the giving of the guaranty held in her hands a sum of money belonging to Smith, as a security for the proper performance by Smith of his duty, which sum the plaintiff had agreed to pay back to Smith on receiving the defendant's guaranty. The declaration then proceeds to allege that in consideration that the plaintiff would pay over to Smith the money so held, and continue him in the service of the plaintiff in the same capacity as before, the defendant guaranteed and promised the plaintiff to make good and be answerable to her for any loss not exceeding £50, which she might at any time sustain through any breach by Smith of his duty during the continuance of such service; and it alleges a breach, in the usual form, that Smith failed to pay over sums of money to the amount of £50, which he had collected on behalf of the plaintiff.

In answer to this declaration the defendant divides the time during which the service lasted, and during which the loss was sustained, into two periods: first, from the 8th of June, 1869, when the contract was made, to the 20th of November, 1869; and, secondly, from the last-mentioned day to the 4th of April, 1871, when the service terminated. As to the first period, the defendant admits his liability for loss incurred by the acts of the servant during that period, and he had paid £10 into court, which he alleges is sufficient to reimburse the plaintiff for such loss. As to the second period, he pleads a plea on equitable grounds, which is to this effect: that the servant had been guilty of defalcations in the course of his service between the 8th of June and the 20th of November, 1869, which the plaintiff had discovered on the latter day, and that the plaintiff then, without communicating such discovery to the defendant, and while the defendant was ignorant of the servant's dishonesty, agreed with the servant to continue him in her employ as before, and the

servant on the other hand agreed to pay to the plaintiff £3 a month on account of the previous defalcations. The plea then alleges that the servant was continued in the plaintiff's service accordingly on these terms. The plea then goes on to state that the loss in respect of which the plea is pleaded was occasioned by acts of dishonesty committed by the servant during the continuance of the service, as so agreed on, after the 20th of November, and between that time and the termination of the service, the defendant during that time being wholly ignorant of the previous defalcations of the servant; and that by reason of the plaintiff not having given the defendant notice of such defalcations he was prevented from revoking the guaranty.

To this plea the plaintiff has demurred, and the question argued before us was whether the plea afforded a good defense to so much of the cause of action as it was pleaded to; namely, the loss occasioned by the defalcations of the servant committed between the 20th of November and the end of the service.

We are of opinion that the plea is good.

We think that in the case of a continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guaranty relates, and if instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he can not afterward have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service.

Suppose that the state of facts, which has arisen here in the course of the service, had existed before or at the time when the guaranty was given, in other words, that the servant had previously committed defalcations in the plaintiff's service, and had agreed to repay them at the rate of £3 a month, and that this fact had been concealed by the master from the defendant when he gave the guaranty, it can not, we think, be doubted that a fraud would have been committed on the surety which would have relieved him from all liability on the contract. This, we think, is established by the judgments in the House of Lords in Smith v. Bank of Scotland, and in Railton v. Mathews. In the former case Lord Eldon says: "If a man found that his agent had betrayed his trust, that he owed him a sum of money, or that it was likely he was in debt: if under such circumstances he required sureties for his fidelity, holding him out as a trustworthy person, knowing or having ground to believe that he was not so, then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct, even with a view to security against future transactions of the agent." In the latter case Lord Cottenham cites with approbation the opinion of Lord Eldon in

Smith v. Bank of Scotland; and Lord Campbell adds, "If the defendants had facts within their knowledge which it was material the sureties should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts—the undue concealment of those facts—discharge the surety."

We do not think that the principles of law as laid down in these cases have been materially altered by the decision of the House of Lords in the subsequent case of Hamilton v. Watson, 12 Cl. & F. 109, or by that of the Court of Exchequer in the North British Insurance Co. v. Lloyd. In the former case the principle above mentioned was not denied, but the question that arose was as to its application to the facts of that particular case; and Lord Campbell states that the criterion for the necessity of voluntarily disclosing any particular fact in cases of this kind may be, whether the fact not communicated was that one could "not naturally be expected to have taken place between the parties who are concerned in the transaction." In North British Insurance Co. v. Lloyd, the Court of Exchequer held that the rule as to the effect of concealment in marine insurance cases did not apply to contracts of suretyship, and that in the latter cases the concealment must be fraudulent in order to avoid the contract. In Lee v. Jones, the majority of the judges in the Exchequer Chamber held that a concealment by the creditor, that at the time of the contract the principal debtor was already indebted to the creditor in a considerable amount—of which the surety was ignorant—was evidence to go to the jury of such a fraud on the surety as would discharge him from liability. It must depend (as observed by Blackburn, J., in the case last cited) "upon the nature of the transaction in every case, whether the fact not disclosed is such that it is impliedly represented not to exist." We can not doubt but that previous acts of dishonesty by the servant in the same service, known to the master, would be such a fact, and if concealed from the surety would avoid the contract. Vide Story's Equity Jurisprudence, Vol. I, 215 and 324.

If, therefore, it is correct, as we think it is on these authorities, to say that such a concealment as is here pleaded, if it had been practiced, at the time when the contract was first entered into, would have discharged the surety, we think that in the case of a continuing guaranty a similar concealment made during the progress of the contract ought to have a similar effect as regards the future liability of the surety unless his assent has been obtained, after knowledge of the dishonesty, that his guaranty should hold good during the subsequent service. One of the reasons usually given for holding that such a concealment as we are here considering would discharge the surety from his obligations is, that it is only reasonable to suppose that such a fact, if known to him, must necessarily have influenced his judgment as to whether he would enter into the contract or not; and in the same manner it seems to

us equally reasonable to suppose that it never could have entered into the contemplation of the parties that, after the servant's dishonesty in the service has been discovered, the guaranty should continue to apply to his future conduct, when the master chose for his own purpose to continue the servant in his employ, without the knowledge or assent of the surety. If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the representation and understanding on which the contract was originally founded continue to apply to it during its continuance and until its termination.

If the guaranty at its inception was founded, as suggested by Lord Eldon in Smith v. Bank of Scotland, on the trustworthiness of the servant, as far as that was known to both parties, as soon as his dishonesty is discovered and becomes known to the master the whole foundation for the continuance of the contract, as regards the surety, fails; and it seems to us in accordance with the plainest principles of equity and fair dealing that the master should, on making such discovery, either dismiss the servant, or if he chooses to continue him in his employ without the knowledge or assent of the surety, that he must himself stand the risk of loss arising from any future dishonesty. "It is the clearest and most evident equity," says Lord Loughborough, in Rees v. Barrington, 2 Ves. 540, 543, "not to carry on any transaction without the knowledge of him (the surety) who must necessarily have a concern in every transaction of the principal debtor. You can not keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." Thus, in the present case, the conduct of the master in retaining the servant in his employ, when he might have discharged him for dishonesty, seems, in the words of Lord Loughborough, an indulgence granted to the servant without the assent of the surety, and contrary to the nature of his engagement. The time at which the surety will be discharged from further liability in cases of this kind will vary according to the circumstances of each case; but we intend our judgment to apply only to cases like the one now before the court, where the master, having the power of at once discharging the servant for dishonesty, deliberately continues him in his service after he becomes aware of the dishonesty, and without the assent or knowledge of the surety.

No case directly in point, either in favor of this plea or against it, has been cited before us. In Peel v. Tatlock, 1 B. & P. 419, 423; and see p. 421, a question arose how far the concealment of the servant's embezzlement for three years after the termination of the service would affect the liability of the surety. No decision was, however, given on that point, and the case contains only a

dictum of Eyre, C. J., that an industrious (by which we presume he meant an intentional or fraudulent) concealment might have an effect on the liability of the guarantor. In Smith v. Bank of Scotland, 1 Dow, at p. 287, there is an observation of Lord Redesdale, made in the course of the argument, which has a closer bearing on the present question. In that case Paterson, the bank agent, seems to have given security to the bank, apparently at the commencement of his service; afterward, and while the service continued, and after his accounts had been inspected and reported on by an officer of the bank, he was called on to give additional security, and Smith, the appellant, gave a bond on such additional security. Smith raised an action of reduction of this bond, and in that action insisted on his right to inspect the above report of the officer of the bank. On this Lord Redesdale observed: "Supposing the report showed that Paterson was no longer trustworthy, and the bank had trusted him notwithstanding, upon decided cases the prior security would be discharged from all consequences of subsequent transactions, as contrary to the faith of the contract. And then it might be a question what bearing this circumstance might have on the new sureties." The cases to which Lord Redesdale alludes are not mentioned, but it seems pretty clearly to have been his opinion that if the master discovers the dishonesty of his servant during the service, and afterward continues to trust him notwithstanding, the surety for the servant would be discharged from all liability for subsequent losses. In the case of Shepherd v. Beecher, 2 P. Wms. 288, 290, before Lord Chancellor King, a father, on binding his son apprentice, gave a bond for his fidelity. Some years afterward the apprentice embezzled £200 of the master's money, of which the master gave notice to the father, and demanded the money. The father paid the amount, but sent a letter requesting the master not to trust the apprentice with cash in the future, or at least to do so very sparingly. The apprentice continued afterward with the master for several years, and committed further embezzlement, of which the father had no notice until two years after the expiration of the apprenticeship, when the bond was put in suit. The Lord Chancellor held that the father continued bound, stating apparently as the ground of his judgment "that the father ought not to have satisfied himself with sending the letter and taking no further care of the matter, but have endeavored to make some end with the master, and to have got up the bond." This decision seems to us to rest on the fact that the father, instead of taking measures to have the bond delivered up, as he might have done, assented to continue bound after he had notice of the first embezzlement, and that the other embezzlements were not actually ascertained until after the expiration of the apprenticeship.

It is well established that a surety, after he has been discharged from his contract by the act of the creditor, may revive his liabil-

ity by a subsequent promise or assent. Mayhew v. Crickett, 2 Swan. 185; Smith v. Winter, 4 M. & W. 454. In that present plea it is alleged as a conclusion of law that, by reason of the concealment, the defendant was prevented from revoking the guaranty and compelling Smith to pay the money for which the defendant was liable. The discharge of the surety in the present case seems to us to arise rather out of the nature and equity of the contract between the parties than upon any assumed right of revocation. We think the surety is discharged unless he assents or agrees, after he has had knowledge of the dishonesty, that the guaranty shall hold good for the subsequent service; but, as a revocation of the guaranty as soon as the dishonesty has come to his knowledge will be the best evidence of dissent, whether his discharge from the contract is founded on express revocation, or want of assent after notice of the dishonesty, seems rather a question of words than of substance.

In Parsons on Contracts, Vol. II, p. 31, the rule as to the right to revoke a guaranty like the present is thus stated: "If the guaranty be to indemnify of misconduct of an officer or servant, the promise is revocable, provided the circumstances are such that, when it is revoked, the promisee may dismiss the servant without injury to himself on his failure to provide new and adequate sureties." No judicial authority is cited in support of this proposition and therefore it can only be cited as the opinion of the writer. It will be seen that he confines the right of the surety to revoke his guaranty to those cases where the master may, on the revocation being made, dismiss the servant without injury to himself. The present case is distinctly within the limitation, and there can be no doubt but that the right of the master at once to discharge the servant on discovering his dishonesty, and so place himself in statu quo, is a most material ingredient in the consideration of the question.

Since the argument of this case, the judgment of Malins, V. C., in Burgess v. Eve, Law Rep. 13 Eq. 450, 458, has been published. The chief question in that case was whether the contract before the court was or was not a continuing guaranty; but in the course of his judgment the Vice-Chancellor expresses an opinion which directly applies to the present case. "My opinion is" (he says), "and I have no hesitation in expressing it, that a person who gives a guaranty would have a right to say to the person taking it, 'You will continue at your own peril to employ the person on whose behalf I gave the guaranty,' provided that the clerk or other person has been guilty of embezzlement or gross misconduct, or has turned out to be unworthy of the confidence reposed in him by the persons giving that guaranty for him. If the employer under such circumstances refused to give the guaranty up, the person giving it would have a right to file a bill in this court, and in my opinion

would succeed in the contest, because the court would direct the bond to be delivered up to be canceled." And the same opinion is repeated in other parts of his judgment. It may be said that this opinion was not necessary for the decision of the case before the Vice-Chancellor, and is not, therefore, a binding authority. That may be so, but the opinion seems to us to be founded on equity and good sense, and as such we adopt it as directly applicable to the case now before us. For these reasons we think that the plea is good, and that the defendant is entitled to our judgment.

Accord: Connecticut Mut. Life Ins. Co. v. Scott, 81 Ky. 540.

WATERTOWN FIRE INSURANCE COMPANY *v.* GEORGE W. SIMMONS ET AL.

131 *Mass.* 85, 41 *Am. Rep.* 196 (1881).

Morton, J.: This is an action against the defendants as sureties upon a bond given by George L. Dix, conditioned for the faithful performance of his duties as agent of the plaintiff, "according to the by-laws, rules and regulations of said company."

One of the by-laws of the company required that the agents should render monthly accounts and should pay each month the balance due to the company. It appeared that Dix rendered his monthly accounts regularly, but that in December, 1877, he failed to pay the whole balance due by him; and that thereafter his indebtedness to the company increased from month to month until his death in March, 1879, when he owed a balance larger than the penal sum of the bond. The plaintiff did not notify the sureties of his default until after his death. The defendants contend that they were discharged from their liability as sureties by these facts.

It is too well settled to be questioned, that the delay of the plaintiff to collect the monthly payments due by Dix would not of itself discharge the sureties. Mere delay by the creditor to proceed against the debtor, unaccompanied by fraud or an agreement to give time, does not discharge the sureties. Hunt v. Bridgham, 2 Pick. 581. The defendants contend that the by-law being referred to in the bond, "amounts to a contract between the plaintiff and the sureties that the plaintiff will not knowingly permit the agent to depart from the duty there recited." The sole object of the bond was to secure the performance by Dix of his duties under the by-laws, and they are referred to only for the purpose of defining these duties. They can not be construed as importing a stipulation with the sureties that the plaintiff shall cause them to be observed and kept, under the penalty of discharging the sureties. Such

by-laws are directory merely, and a failure to observe them by the plaintiff or its managing officers will not discharge the sureties. Amherst Bank v. Root, 2 Met. 522; Locke v. United States, 3 Mason 446.

But the principle ground of defense is that it was the duty of the plaintiff, within a reasonable time, to notify the sureties of any default of the agent, and that the failure to do so was laches which discharge them. It may be questioned whether, if there was negligence of the other officers or agents amounting to laches, the corporation would be affected by it, as the object of the bond was to give the stockholders the double security of the supervision of its officers and the obligation of the sureties. Amherst Bank v. Root, ubi supra. But treating this case as if it were the case of an individual obligee, we are of opinion that there is no rule of law which makes it a duty which the creditor, under the circumstances of this case, owes to the surety, either to dismiss its agent or to notify the surety of his default. If a creditor does any act which injuriously affects the situation and rights of the surety, such as giving time to the debtor, or relinquishing surety which he holds for the debt, he discharges the surety either in whole or pro tanto. But the creditor owes no duty of active diligence to take care of the interest of the surety. It is the business of the surety to see that his principal performs the duty which he has guaranteed, and not that of the creditor. Wright v. Simpson, 6 Ves. 714; Adams Bank v. Anthony, 18 Pick. 238; Taft v. Gifford, 13 Met. 187; Tapley v. Martin, 116 Mass. 275. The surety is bound to inquire for himself, and can not complain that the creditor does not notify him of the state of the accounts between him and his agent, for whom the surety is liable. Mere inaction of the creditor will not discharge the surety unless it amounts to fraud or concealment.

The defendants rely upon the cases of Phillips v. Foxall, L. R. 7 Q. B. 666; Enright v. Falvey, 4 L. R. Ir. 397, and Sanderson v. Aston, L. R. 8 Ex. 73. In the first two cases, it was held that, in the case of a continuing guaranty for the honesty of a servant, if the master discovers acts of dishonesty in the servant and afterward continues him in his service without notice to the sureties, the latter are discharged. We have no occasion to discuss these cases further than to say that they have no application to the case before us, because it is not contended that the agent Dix, for whom the defendants were bound, was guilty of any defalcations or other dishonest or fraudulent conduct. In Sanderson v. Aston, the declaration was on a bond guaranteeing that one J., a clerk of the plaintiff, should pay over all money he received on the plaintiff's account; the plea was, that, before the defaults sued for, J. had committed other defaults of the same kind, and the plaintiff, knowing this, continued to employ him without notice to the defendant. On demurrer, this plea was held good. Chief Baron Kelly, in de-

livering his opinion, says, "the case of Phillips v. Foxall clearly shows that, if any defaults or breaches of duty, whether by dishonesty or not, have been committed by the employed against the employer, under such circumstances that the employer might have dismissed the employed, the surety is entitled to call on the employer to dismiss him." This decision does not seem to be sustained by Phillips v. Foxall, which was a case of criminal embezzlement by the servant, and we are not aware of any other decisions sustaining it, at least in this country. Its effect would be to impose upon the creditors the duty of notifying the sureties whenever there are any arrears in the accounts of the agent or servant for whom they are bound, from whatever cause arising. We do not think that any such active duty of diligence to protect the sureties grows out of the decision in Sanderson v. Aston, regarding it as in conflict with the general current of authorities.

This question was considered in Atlantic & Pacific Telegraph Co. v. Barnes, 64 N. Y. 385; and it was held that continuing an agent in service after a default is known, without notice to the surety, does not discharge him, no fraud or dishonesty being shown. See also McKecknie v. Ward, 58 N. Y. 541.

Upon the whole case, therefore, we are of opinion that, upon the facts stated in the bill of exceptions, the sureties were not discharged; and that the superior court rightly found for the plaintiff.

Exceptions overruled.

Accord: Pittsburg, Fort Wayne, etc., R. Co. v. Shaeffer, 59 Pa. 350; La Ros v. Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805.

THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY, RESPONDENT, *v.* JAMES A. BARNES ET AL., APPELLANTS

64 *N. Y.* 385, 21 *Am. Rep.* 621 (1876).

Appeal from judgment of the General Term of the superior court of the city of New York in favor of plaintiff, entered upon an order denying a motion for a new trial and directing judgment upon a verdict.

This action was upon a joint and several bond executed by defendants to the plaintiff upon the employment by the latter of defendant William E. Barnes.

The bond was conditioned, among other things, that said Barnes should "faithfully account for all moneys and property belonging to said Atlantic & Pacific Telegraph Company which shall come to his hands, whether the same shall be paid or delivered to him

by said Atlantic & Pacific Telegraph Company to be disbursed or used for its account, or shall be received by him from other persons for the use and benefit of said Atlantic & Pacific Telegraph Company, or shall come to his hands in any other manner."

The bond in question was executed, and Barnes entered into the employment of the defendant December 22, 1873. It was admitted on the trial, that on January 30, 1874, Barnes was in default to the plaintiff in the sum of fifteen dollars and ninety-two cents, of which plaintiff had knowledge, but did not notify the sureties, and continued Barnes in its employ until March 24, 1874, when he was discharged. His default at that time amounted to $269.67.

A motion on the part of defendants to dismiss the complaint was denied, and the court directed the jury to find a verdict for the plaintiff for the full amount. Defendants duly excepted. A verdict was rendered accordingly.

Exceptions were ordered to be heard at first instance at General Term.

MILLER, J.: This action was upon a bond executed by the defendants for the benefit of one of them, who was an employé of the plaintiff. About one month after the bond was given, the principal was in default for a small amount, of which the plaintiff had knowledge. He did not notify the sureties of such default, but continued to employ the principal until the default had increased to the amount claimed in the complaint. It is insisted that the failure of the plaintiff to give such notice exonerated the sureties from liability for any subsequent defalcation or dishonesty of the principal during his continuance in plaintiff's service, and that by reason of this neglect they were discharged from liability. The principle contended for is not without sanction, and the question to be determined here is to the application of certain established rules, and the adjudications of the courts to the facts presented upon this appeal.

Judge Story on Equity Jurisprudence (324), lays down the rule that "any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditors, either by surprise or by withholding proper information, will undoubtedly furnish sufficient ground to invalidate the contract." The English authorities, especially those of a recent date, go very far to uphold the position that the employer is bound to notify those who have become guarantors for the faithful discharge of the duties which the employé has assumed to perform, of any defalcation or dishonesty on the part of the latter, as will be seen by a brief reference to some of the leading cases. In Rallston v. Mathews, 10 Clark & F. (House of Lords Cases) 934, an action was instituted to avoid a bond executed for the fidelity of a commission agent to his employers, upon the ground of concealment of material circumstances affecting the

agent's credit prior to the date of the bond, and which if communicated to the surety would have prevented him from undertaking the obligation, and it was laid down, that mere noncommunication of circumstances affecting the situation of the parties, material for the surety to be acquainted within the knowledge of the person obtaining the surety bond was undue concealment, though not wilful or intentional, or with a view of any advantage to himself. In this case the concealment alleged was prior to the execution of the bond, and hence it bears a different aspect than if the facts concealed had transpired after the bond had been executed.

In Phillips v. Foxall (L. R. 7 Q. B. 666), where there was a continuing guaranty of the honesty of a servant, it was held that if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he can not afterward have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during his subsequent service. A later case, Sanderson v. Aston (L. R. 8 Exch. 73), upon the authority of Phillips v. Foxall, upholds substantially the same principle. (See also, Burgess v. Eve, L. R. 13 Eq. 450, 458; Montague v. Tidscombe, 2 Vern. 518.)

The early adjudicated cases in this state have not gone to the extent of the rule laid down, perhaps for the reason that no case of palpable dishonesty, known to the employer, was actually presented which required the courts to determine the precise question whether notice was demanded under such circumstances. It is not necessary to examine them in detail, as those as well as other cases bearing on the question are fully considered and sharply criticized in the opinion of Judge Folger, on McKecknie v. Ward (58 N. Y. 541). In that case an action was brought upon a bond in the penalty of $2,000, conditioned for the performance by the principal of a contract between him and the plaintiffs, which were recited in the bond, and it was held that a contract of suretyship for the performance, by a vendee, of a continuing agreement of purchase and sale, by which goods purchased from time to time, as required, are to be paid for at stated periods, is not discharged by mere forbearance on the part of the vendor, to enforce payment as provided for by the contract, without a binding agreement for the extension of time. It was there said that mere indulgence of the creditor in such a case was not enough to discharge the surety; that beyond the bare neglect of the creditor to enforce payment, there must be some connivance or gross negligence amounting to wilful shutting of the eyes to fraud. The case was distinguished from Phillips v. Foxall and Sanderson v. Aston (supra), as those related to master and servant, and the obligation incurred was that there should be no breach of duty, and for the honesty of the principal. If,

in such a case as the one last cited, connivance and gross negligence will discharge the surety, it would seem that quite as strong reasons exist for discharging sureties where it is known to the master that the servant has been dishonest, and has appropriated to his own use funds which he has received by virtue of his employment, and, with full knowledge of such a dereliction of duty, continues to allow such servant an opportunity to increase his defalcation. Such conduct of the master would be a clear violation of the rule which obligates him to do no act which would injure or impair the liability of the sureties.

The bond executed by the defendants in this case provided that the principal should faithfully account for all moneys and property which should come to his hands, and the admission made upon the trial shows that he was in default to the knowledge of the plaintiff, and no notice given of said default to the sureties. The nature of such default and how, or under what circumstances it arose, is not proved, and we are left to inference to determine its origin and real character. In Phillips v. Foxall (supra) and kindred cases, the dishonesty of the servant was conceded, and no question was presented as to that fact. While here it is not entirely manifest that the default was occasioned by dishonesty, perhaps temporary absence, sickness or some unavoidable accident may have prevented an accounting by the principal, and delayed payment of the amount in arrears, and it may be accounted for on the assumption that there was no breach of honesty or want of integrity on the part of the servant. If the default of the principal was merely casual, and without fraud or dishonesty, then, within the rules laid down, there was no concealment of material facts, or suppression of proper information, which rendered the contract of the sureties invalid. Where such a defense is interposed the proof should be reasonably clear that the delinquency was caused by dishonest conduct or a gross violation of the obligations imposed by the bond. We think that there is a want of evidence in this respect, and, for this reason, the court was right in denying the motion to dismiss the complaint, and in directing a verdict for the plaintiff.

The judgment should be affirmed, with costs.

All concur, except Allen and Earl, JJ., not voting.

Judgment affirmed.

SECTION 13. STATEMENTS BY CREDITOR AFTER DEFAULT

N. W. WILKINS *v.* BETTY HANSON ET AL.

119 *Minn.* 399, 138 *N. W.* 418, *Ann. Cas.* 1914B, 56 (1912).

Action in the district court for Clay county to recover $300 upon a promissory note. Defense of defendants Bayer and Beck is stated in the opinion. The case was tried before Nye, J., who directed a verdict against defendants Hanson and denied a motion to direct a verdict against defendants Bayer and Beck, and a jury who returned a verdict in their favor. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

Bunn, J.: This action was to recover on a promissory note executed by the defendants Betty Hanson and A. Hanson, as principals, and by defendants Bayer and Beck as sureties. The Hansons did not appear at the trial, and a verdict was directed in plaintiff's favor as against them. As between plaintiff and defendants Bayer and Beck, the case was submitted to the jury, and a verdict returned in favor of said defendants. Plaintiff appeals from an order denying his motion for a new trial.

The assignments of error raise but one question: Was plaintiff entitled on the evidence to a directed verdict against defendants Bayer and Beck?

The defense was that after the maturity of the note, and at a time when the Hansons were preparing to move to Canada, the sureties, on requesting A. Hanson to pay the note, were informed by him that it had been paid, and that upon inquiring of plaintiff if the note had been paid, were informed by him that it had been settled; that had they not been "lulled to security" by this statement of plaintiffs, defendants could and would have protected themselves by collecting the note from the Hansons.

The law is well settled that, if a creditor informs a surety that the debt is paid or settled, and thereby lulls the surety into security, inducing him to take no steps to protect himself, the creditor is estopped from thereafter proceeding against the surety, if there is evidence tending to show that the surety was damaged; that is, that he might have protected himself had he not been induced to take no steps to that end. 32 Cyc. 214; Child's Suretyship and Guaranty, 265; Carpenter v. King, 9 Metc. (Mass.) 511, 43 Am. Dec. 405; Sioux Falls v. Kellog, 81 Iowa 124, 46 N. W. 859; Auchampaugh v. Schmidt, 80 Iowa 186.

The evidence was ample to justify the submission to the jury of the question whether plaintiff stated to defendants that the note had been settled, and the question whether defendants relied on

this statement and were thereby induced to allow the Hansons to depart for Canada without taking any steps to protect themselves. The only doubt is whether defendants suffered any loss, that is, whether there is any showing that would warrant the jury in finding that they could have protected themselves had they made the effort. We have examined the record with care, and reach the conclusion that this question was for the jury. There was evidence tending to show that A. Hanson had recently received $800 on a life insurance policy, that he had a car loaded in part with personal property ready to transport to Canada, and that his wife, defendant Betty Hanson, owned a building, which had just been sold for some $700 more than the incumbrance thereon. While this evidence does not make a strong showing of actual damage to the sureties, we are satisfied that it is sufficient to warrant the submission of the question to the jury. We hold that the trial court was correct in denying plaintiff's motion for a directed verdict.

Order affirmed.

Accord: Harris v. Brooks, 38 Mass. 195, 32 Am. Dec. 254; Whitaker v. Kirby, 54 Ga. 277; Cochecho Nat. Bank v. Haskell, 51 N. H. 116, 12 Am. Rep. 67.

BRUBAKER *v.* OKESON

36 *Pa. St.* 519 (1860).

Error to the common pleas of Juniata county.

This was an action of debt by John Brubaker, for the use of Robert C. Gallagher, against William Sherlock (who was not served with process) and William Okeson, upon a joint and several single bill, of which the following is a copy:

"$400. Fifteen months after date, we or (either) of us do promise to pay to John Brubaker the sum of four hundred dollars, without defalcation, for value received, with interest from date.

"Witness our hands and seals the 1st day of February, 1856.

"WILLIAM SHERLOCK,
"WILLIAM OKESON."

(Seal)

The defense was, that Okeson was the surety of Sherlock, and that Brubaker had released him by giving time to the principal debtor. The evidence given on the trial is fully stated in the following charge to the jury, delivered in the court below by Graham, P. J.:

"This action is upon a note dated 1st February, 1856, signed by William Sherlock and William Okeson, for the payment of $400 to

John Brubaker, fifteen months after date, with interest. Sherlock has not been served with process, and the case is now being tried against William Okeson alone. The defense is, that Okeson was the surety of Sherlock, and he was released from his suretyship by Brubaker.

"The evidence tends very strongly to show that Sherlock was the principal debtor and Okeson his surety. If you are satisfied from the evidence that Okeson was the surety of Sherlock, then it becomes an important inquiry in the case, whether Brubaker released Okeson from liability to him on this note as the surety of Sherlock.

"The evidence shows that Sherlock lives in the West, and that Brubaker visited him in 1857; that after his return he met with Okeson at a sale, when the conversation relied upon by the defendant's counsel occurred. Jonathan P. Doyle, a witness called by the defendant, testifies that on the 3d of December, 1857, he was present and heard a conversation on this subject between Brubaker and Okeson; that Brubaker said to Okeson, 'that William Sherlock is good enough for the money, and I don't want you;' that Mr. Brubaker said he had been to the West to see Sherlock, and told of his prospects, said he had given him time till he would get his crops out; that he (Sherlock) was good enough and Brubaker did not care about Okeson.

"James Gilliford testifies to the same conversation; that Brubaker said Sherlock had a good crop of wheat, a fine appearance for a good crop of corn, and a good stock of horses and cattle on his farm; that he had given him time, or would give him time, and that Sherlock would pay it, and that he (Brubaker) did not want Okeson any longer. If this conversation occurred, and it was all the conversation that occurred between the parties, and Okeson was the surety of Sherlock, it would discharge Okeson, and be an available defense, on the ground that it would lull the surety into security, and prevent him from taking any action of his own security or indemnity, and it would be a fraud upon the surety, for the creditor afterward, contrary to his assurance, to call upon the surety for payment.

"To repel the effect of this evidence, the plaintiff has called William Hart, who testifies that he was present at this conversation, and the principal remark, that he remembers, was, that Brubaker said to Okeson, that if Sherlock did not pay that money in the spring, he would look to Okeson for it. The plaintiff also relies upon the evidence of John Woodward, who testifies that in a conversation with William Okeson, in December, 1858, after Sherlock had made an assignment, Okeson spoke of Brubaker's claim against Sherlock, and said he expected to have it to pay, but that he would get it again, and that Sherlock would be able to hold his property.

"It is for you to pass upon this conflicting testimony. If Doyle and Gilliford stated all that occurred between these parties at the

conversation referred to, Mr. Okeson would be discharged, and you should find for the defendant. On the contrary, if you believe that Brubaker, at the conclusion of the conversation, told Okeson that he would look to him for payment, if Sherlock did not pay in the spring, then the previous conversation, as testified to by Doyle and Gilliford, would not discharge Okeson, if at that time, as plaintiff's counsel allege, Brubaker gave notice that he would look to him for payment."

To this instruction the plaintiff excepted; and a verdict and judgment having been rendered for the defendant, the plaintiff removed the cause of this court, and here assigned the same for error.

The opinion of the court was delivered by Strong, J.

The original liability of Okeson to pay the debt was established, and indeed it was not denied. It was, therefore, incumbent upon him to show affirmatively his discharge from that liability. This he attempted to do, by evidence that he was a surety, and that the creditor had told him on one occasion that Sherlock, the principal debtor, was good enough for the money; that he did not want him (Okeson); that he had been to the West to see Sherlock; and that he had a good crop of wheat, a fine appearance for a good crop of corn, and a good stock of horses and cattle on his farm; that he had given him time or would give him time, and that Sherlock would pay it, and that he did not want Okeson any longer. The court charged the jury that "if this conversation occurred, and it was all the conversation that occurred between the parties, and Okeson was the surety of Sherlock, it would discharge Okeson, and be an available defense, on the ground that it would lull the surety into security, and prevent him from taking any action for his own security or indemnity, and it would be a fraud upon the surety, for the creditor, afterward, contrary to his assurance, to call upon the surety for payment." To this instruction the plaintiff excepted, and he has assigned it here for error.

It is noticeable, that the learned judge did not submit to the jury to find what the plaintiff intended, or what the defendant understood by the expressions, he had "given time" to Sherlock, and that "he did not want Okeson any longer." The court construed the language of the witnesses, and took away from the jury all inquiry as to its meaning. The rule, however, is undoubted, that the meaning of words used in conversation, and what the parties intended to express by them, is exclusively for the jury to determine. 9 Watts 59. It is obvious that the testimony is utterly inadequate to prove a direct and binding release of the surety. The creditor said "he did not want Okeson any longer," but this did not amount to an agreement to discharge him, and if it did, it was entirely without consideration, and therefore inoperative.

Nor does the expression of the creditor that he had given time to the principal debtor necessarily amount to proof of an equitable re-

lease of the surety. It was quite possible for him to give time, without affecting in the least the liability of Okeson. Nothing short of an agreement to give time, which binds the creditor and prevents his bringing suit, will discharge the surety. Mere delay, without such a binding agreement, will not. And, if such an agreement may be inferred, from a simple declaration of the creditor, that he had given time (which we do not admit), it is not to be inferred by the court, as a presumptio juris de jure. Whether the jury were at liberty to draw such an inference need not now be considered. How they could, is certainly not manifest, for giving time, and a contract to give time, are distinct and independent things. Proof of the existence of a subject-matter, about which a contract may be made, would seem to have no tendency to prove that one in fact had been made.

Indeed, the learned judge of the common pleas does not appear to have rested the defendant's case upon either of these grounds. His view was that the defendant was discharged, because of the language of the plaintiff, alleged to have been proved, would lull him into security, and prevent his taking any action for his own indemnity; and because it would be a fraud upon the surety, for the plaintiff afterward to call upon him for payment. The simple meaning of this is that the plaintiff was estopped, not by matter of record, or by deed, but by matter in pais. The objection to it is, that there was nothing in the evidence to warrant the conclusion that the defendant had been injured by the declarations of the plaintiff, or that he was in any worse condition than he would have been in had those declarations never been made. Certainly, it was not for the court to say, as matter of law, that he had been injured. But it is essential to an equitable estoppel by matter in pais, that he who sets it up should show that he has been misled to his hurt. Dezell v. Odell, 3 Hill 215; Patterson v. Lytle, 1 Jones 53; Hill v. Epley, 7 Casey 334. It never yet has been held that a declaration of the creditor that the principal debtor was good enough, that the surety was in no danger, and that the debt would be collected from the principal, without more, was sufficient to estop the creditor from proceeding against the surety. Such declarations are exceedingly common. They are often made to induce the surety to go into the contract, and they are repeated afterward, without any design to mislead, or without being understood as a waiver of any rights. They are made and received as expressions of opinion. They neither invite confidence, nor is confidence often reposed in them. Standing alone, they will not discharge the surety.

Bank v. Klingensmith, 7 Watts 523, does not sustain the charge of the court in this case. There the creditor held a judgment against the principals and the surety; the surety called upon the creditor, and requested that an execution might be issued to seize the principals' property about being removed; he stated that he wished to

be released, and that the principal had property sufficient within reach of an execution to pay the debt; the creditor refused compliance, stated that the principal was good enough, and that he would give the defendant clear of his indorsement; no execution was issued. There is no similarity between that case and the present. There the surety was in motion to secure himself; he had a right to insist that execution should be issued, and he did insist. There was proof of actual injury in withholding the execution, an execution to which the surety was entitled on his request, and the case was put upon the ground, both in the court below and in this court, that he had sustained injury, not from the declarations of the creditor, but from the withholding of the execution.

The case of Harris v. Brooks, 21 Pick. 195, relied upon by the defendant in error, is not unlike Bank v. Klingensmith. There the surety was also in motion; he called upon the creditor, and stated that if he had to pay the debt he wished to attend to it soon, as he then could get security of the principal; the creditor assured him that he (the creditor) would look to the principal for payment, and that he (the surety) need not give himself any trouble about the note, for he should not be injured. The case was put to the jury with the instruction that, if in consequence of this assurance of the creditor the surety omitted to take up the note and secure himself out of the property of the principal debtor, he was discharged. The defense, therefore, as in Bank v. Klingensmith, rested not in the declarations of the creditor alone, but on them and superadded evidence that there had been actual harm resulting from them to the defendant. This essential to estoppel in pais was, therefore, not wanting, as it is in the present case. The language of Chief Justice Shaw is to be understood as applicable to the case he then had in hand, a case in which the jury found that injury had resulted from the declarations of the creditor, and the only question therefore was, whether they were such as to warrant his relying upon them, and guiding his action by them. Surely, without having been the occasion of injury to the defendant, the creditor can not be guilty of a fraud upon him, by calling upon him to pay a debt which he has promised to pay, and no declaration which has not, in fact, influenced his conduct can have done the surety any harm. In losing sight of this, consists the error of the charge, and for this reason, pointed out in both the assignments of error, the judgment must be reversed.

Judgment reversed, and a venire de novo awarded.

Accord: Michigan State Ins. Co. v. Soule, 51 Mich. 312, 16 N. W. 662; Driskell v. Mateer, 31 Mo. 325, 80 Am. Dec. 105.

The mere statement by the creditor that in his opinion the principal will pay the debt will not discharge the surety. Howe Machine Co. v. Farrington, 82 N. Y. 121.

SECTION 14. SET-OFF AND COUNTERCLAIM

GILLESPIE ET AL *v.* TORRANCE

25 *N. Y.* 306, 82 *Am. Dec.* 355 (1862).

Appeal from the superior court of the city of New York. Action upon a promissory note against the indorser only. Defense, that the indorsement was for the accommodation of the maker; that the note was one of several given for oak timber sold to the maker by the plaintiffs; that the timber was a raft in the Hudson River, opposite the city of New York, and that, on making the sale, the plaintiffs produced certificates of inspection showing that there were 29,441 feet of first-quality oak, for which Van Pelt, the maker of the notes, agreed to pay 27½ cents per foot, and 5,523 feet of second-quality or refuse oak, for which Van Pelt agreed to pay 13¾ cents per foot; that, by the usage of the timber trade in New York, the seller is deemed to warrant that the timber sold corresponds in quantity and quality with the description in such inspection certificates; that Van Pelt gave his notes, indorsed by the defendant, for various sums, amounting in the aggregate to $9,000, the price of the timber as computed from the inspection certificates, and all of which notes had been paid except the one in suit; that after the delivery of the timber it was discovered that the inspection certificates were erroneous in this, that of the timber of first quality there was 15,000 feet less than the certificates stated, and an equal excess in the refuse timber; that if the prices had been correctly computed according to the fact, instead of being computed according to the certificate, it would have amounted to less than $5,000; that the plaintiffs had, therefore, been overpaid, and that there was no consideration for the note in suit. On the trial, the judge, under exception by the defendant, excluded evidence as to the quantity of the timber of the different qualities; declined to permit an amendment of the answer alleging an express warranty; and excluded evidence of the usage set up in the answer, making a sale by certificate equivalent to a warranty. The other facts stated in the answer were substantially proved or admitted. The plaintiffs had a verdict and judgment, which having been affirmed at general term, the defendant appealed to this court.

Selden, J.: The defense in this case is not founded on a failure of the consideration of the note, otherwise than by a defect in the quality of the timber for which it was given. That being so, if there was neither warranty nor fraud in the sale of the timber, the defect in quality constitutes no defense. (Seixas v. Woods, 2 Caines 48; Sweet v. Colgate, 20 John 196; Welsh v. Carter, 1 Wend. 185; Johnson v. Titus, 2 Hill 606.) The answer does not allege fraud in

the transaction, and unless it shows a warranty of the quality of the timber, it presents no defense to the note, either partial or total. The argument of the appellant's counsel to maintain the position that the defense rested upon a failure of consideration, and not upon a claim for damages on a breach of warranty, is very ingenious; but the answer and the proof show that all the timber contracted to be delivered to Van Pelt, and for which the notes were given, was in fact delivered, and the real ground of complaint is, that a much larger proportion of it than was shown by the inspector's certificates, upon the faith of which the purchase was made, proved to be of inferior quality. The law being well established that such defect of quality, in the absence of fraud or warranty, constitutes no defense to the note, or to any part of it, and there being no pretense of fraud, it follows that the defense, if there is any, rests upon a breach of warranty.

The question then arises whether the plaintiff, an accommodation indorser upon a note given by Van Pelt to the plaintiffs for the timber, can avail himself of a breach of the contract of warranty in regard to the quality of the timber, made by the plaintiffs to Van Pelt, on the sale to him. To decide this question, it is necessary to ascertain the ground upon which such defenses, by way of recoupment, as they were denominated prior to the adoption of the code now, partially, if not wholly, merged in the much broader term, counterclaim, were admitted. If we regard such defenses as resting upon a failure of the consideration of the contract on which the plaintiff's action is founded, then unquestionably the defendant could avail himself of the breach of warranty in this case, because an indorser or surety may always, where the contract has not been assigned, show a failure, partial or total, of consideration of his principal's contract which he is called upon to perform. But if such defenses are regarded as the setting off of distinct cause of action, one against the other, then it is clear, as will be shown hereafter, that this defendant could not avail himself of such defense.

The subject of the precise ground on which a defendant is allowed to reduce a recovery against him, in an action upon a contract, by alleging and proving fraud or breach of warranty—whether the contract, where there is fraud is regarded as destroyed, and the recovery had on a quantum meruit, or whether the reduction of the plaintiff's claim rests upon a partial failure of consideration, or upon the setting off of distinct claims against each other—has often been discussed, but without any general concurrence of opinion on the question. (Reab. v. McAllister, 4 Wend. 90 et seq.; s. c. in error, 8 id. 109; Batterman v. Pierce, 3 Hill 171, 177; Ives v. Van Epps, 22 Wend. 155; Nichols v. Dusenbury, 2 Comst. 286; Van Epps v. Harrison, 5 Hill 66; Barber v. Rose, id. 78; Baston v. Butler, 7 East. 479; Withers v. Greene, 9 How. U. S. 213.)

A careful examination of the subject, I think, must lead to the conclusion that wherever recoupment, strictly such, is allowed, distinct causes of action are set off against each other. This would seem to follow from the right of election, which all the cases admit the defendant has, to set up his claim for damages by way of defense, or to resort to a cross-action to recover them. (Ives v. Van Epps, 22 Wend. 157; Batterman v. Pierce, 3 Hill 171; Britton v. Turner, 6 N. H. 481; Halsey v. Carter, 1 Duer 667; Barber v. Rose, 5 Hill 81; Stever v. Lamoure, Lalor's Supp., 352, note a.)

In many cases the defendant's damages would exceed the amount of the plaintiff's claim, which shows conclusively that such damages do not rest upon a mere failure of consideration. Where there is a fraud, the party deceived, on discovering the fraud, may rescind the contract; but if he does not do that, the contract on his part remains entire, not broken and not modified, and he is bound to perform it fully according to its terms: he has, however, arising from the fraud, a distinct cause of action, the amount of which he may set off against any liability on his part growing out of the transaction in which the fraud was perpetrated. As was said by Bronson, J., in Van Epps v. Harrison: "When sued for the price, the vendee may in general recoup damages; but while he retains the property he can not treat the contract as wholly void, and refuse to pay anything. By retaining the property he assumes the validity of the contract, and can be entitled to nothing more than the damages which he has sustained by reason of the fraud." The same principle is applicable to cases of warranty, except that the breach of warranty gives no right to rescind, unless there is an express contract to that effect. (Street v. Blay, 2 Barn. & Ad. 456; Voorhees v. Earl, 2 Hill 288; Cary v. Gruman, 4 id. 625; Muller v. Eno, 14 N. Y. 597; Thornton v. Winn, 12 Wheat. 183; Lattin v. Davis, Lalor's Supp. 16) In ordinary cases of breach of warranty, therefore, both contracts remain binding to their full extent, and where recoupment is allowed damages for a breach on one side are set off against like damages on the other side. The "cross-claims arising out of the same transaction compensate one another, and the balance only is recovered." (8 Wend. 115; 22 id. 156; 3 Hill 174; 2 Comst. 286.)

It has always been optional, as is suggested above, since the doctrine of recoupment has gained a foothold in the courts, with a party who has sustained damages by fraud or breach of warranty in the purchase of goods, when sued for their price, to set off or recoup such damages in that action, or to reserve his claim for a cross-action; and when he elected to recoup he could not, under the revised statutes, have a balance certified in his favor, nor could he maintain a subsequent action for such balance. (Sickles v. Pattison, 14 Wend. 257; Batterman v. Pierce, 3 Hill 171; Wilder v. Case, 16

Wend. 583; Stever v. Lamoure, Lalor's Supp. 352, note a; Britton v. Turner, 6 N. H. 481.)

Under the code of procedure, doubtless a balance might be recovered (Code, 150-274; Ogden v. Coddington, 2 E. D. Smith 317); but the right of election to set up a counterclaim in defense, or to bring a cross-action for it, still exists. (Hasley v. Carter, 6 Duer 667; Welch v. Hazelton, 14 How. Pr. 97.) Now it is not easy to reconcile with these established principles the right of the defendant in this suit to avail himself of the claim which Van Pelt may have against the plaintiffs on a breach of warranty. **1.** Such damages constitute a counterclaim, and not a mere failure of consideration, and not being due to the defendant, can not be claimed by him. (Code 150; Lemon v. Tull, 13 How. Pr. 248; 16 id. 576, note.) **2.** Van Pelt has a right of election whether the damages shall be claimed by way of recoupment in the suit on the note, or reserved for a cross-action. The defendant can not make this election for him. **3.** If the defendant has a right to set up the counterclaim, and have it allowed, in this action, it must bar any future action by Van Pelt for the breach of warranty and as no balance could be found in defendant's favor, he might thus bar a large claim in cancelling a small one. If the right exists in this case, it would equally exist if the note was but $100 instead of $1,800. 4. Supposing the other notes given for the timber to have been indorsed by different persons, for the accommodation of Van Pelt, and all to remain unpaid, each of the indorsers would have the same rights as the defendant. If they were to set up the same defense, how would the conflicting claims be reconciled?

In the case which was shown on the trial there would seem to be a strong equity in favor of the defendant to have the note canceled or reduced, by applying toward its satisfaction the damages which appear to be due to Van Pelt for the breach of warranty. It is, however, an equity, in which Van Pelt is interested to as great, and possibly a greater extent than the defendant, and can not be disposed of without having him before the court, so that his rights, as well as those of the defendant, may be protected. That remedy may be open to the defendant still, notwithstanding the judgment; especially if the insolvency of the parties renders that course necessary for his protection. (14 Johns. 63, 17; id. 389; 2 Cow. 261; 2 Paige 581; 6 Dana 32; 8 id. 164; 2 Story's Eq. Jur. 1446, a, 1437.) My conclusion is, that the court below was right in holding that the defendant could not set up the breach of warranty in defense, partial or total, to the suit on the note; and as the warranty presented the only ground on which there could be a claim of defense under the answer, there is no necessity for considering the other questions presented in the case.

The judgment should be affirmed.

All judges concurring.

Judgment affirmed.

JOHN E. LASHER, RESPONDENT, *v.* WILLIAM WILLIAMSON ET AL., APPELLANTS.

55 *N. Y.* 619 (1874).

Appeal from judgment of the general term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff entered upon the decision of the court upon trial without a jury.

This action was brought against defendants, as sureties of one Bernard Gibbs, to recover rent alleged to be due upon a lessee of certain premises from plaintiff to said Gibbs.

The facts appear sufficiently in the opinion.

JOHNSON, J.: The defendants and appellants were sureties for one Gibbs, to whom the plaintiff had executed a lease under seal of certain premises, and they had by an instrument under seal covenanted that Gibbs should pay the rent, and that if he should be in default they would pay the deficiency. In answer to the plaintiff's action for the unpaid rent the defendants gave evidence tending to show that, as part of the arrangement between Gibbs and the plaintiff, the latter had verbally agreed with Gibbs to furnish to him during the period of the lease a certain quantity of property to be stored upon the described premises at an agreed price, and that he had furnished only a part of the quantity promised, and failed to furnish the residue. Assuming, in favor of the appellants, that no objection to this proof can be sustained on the ground that it is supported only by unwritten evidence, I am yet of opinion that it gives them no defense or counterclaim available in this action. It was the promise to furnish the storage which may be regarded as forming part of the consideration for the agreement of Gibbs. The breach of that promise gave him a cause of action against the plaintiff, but this cause of action in favor of Gibbs can not be available to the appellants. It belongs to Gibbs and not to them. The case falls within the principle of Gillespie v. Torrance (25 N. Y. 306).

The nonperformance or partial performance of Lasher's engagement to Gibbs is not to be regarded as a failure of consideration, but as an independent cause of action, which Gibbs, and he only, may assert. It is in his election to determine whether it shall be used defensively, or whether he will bring his own action for the damages, or whether he will forego his claim altogether. The defendants have no control over him in this respect and can not borrow and avail themselves of his rights.

The judgment must be reversed.

All concur.

Judgment affirmed.

Accord: Baltimore, etc., R. Co. v. Bitner, 15 W. Va. 455, 36 Am. Rep. 820.

Contra: Scroggin v. Holland, 16 Mo. 419; Bechervaise v. Lewis, L. R. 7 C. P. 372.

HENRY WAGNER *v.* D. W. STOCKING ET AL.

22 *Ohio St.* 297 (1872).

The original action was brought in the court of common pleas of Geauga county, on a joint and several note given by the defendants to the plaintiff. The defendants answered separately, each alleging that the defendant, Stocking, was principal in the note, and that the defendant Smith was surety only; and setting up an account due from the plaintiff to the defendant Stocking, which they asked might be set off against the amount due on the note, and the defendant Stocking asked for a judgment in his favor, for the balance he claimed to be due on the account above the amount due on the note. The plaintiff demurred to the answers, which was overruled. He then replied, claiming that the account was liquidated in a settlement on which the note was given for the balance due, and denied that there was anything due thereon.

On the trial to the jury the defendants offered evidence to prove the account, to which the plaintiff objected, on the ground that the account due to one of the defendants only was not a proper matter of set-off in the action; but the objection was overruled, and the evidence admitted, to which the plaintiff excepted.

The plaintiff requested the court to charge the jury that if they found that the plaintiff was indebted, at the commencement of the action, to the defendant Stocking only, as claimed in the answers, and not to both of the defendants, they could not allow the account as a set-off in the action, which instruction the court refused to give, and the plaintiff excepted.

The jury found the amount due on the note, and the amount due on the account, and that the balance due the defendant Stocking was four dollars and eighty cents; and thereupon returned a verdict upon the issue in favor of the defendants. The plaintiff moved for a new trial, by reason of the rulings aforesaid, which was overruled, and the plaintiff excepted. Judgment was rendered in favor of the defendants for costs, and in favor of Stocking for the balance found his due. To reverse this judgment the plaintiff prosecuted his petition in error, in the district court, and assigned for error the rulings of the court against him, as before stated. The case was reserved in the district court for decision in the Supreme Court.

Day, J.: It appears from the record that the defendants sustained the relation of principal and surety in the note on which the suit was brought, and the only question made is, whether a demand due from the plaintiff to the principal alone may be set off against the claim of the plaintiff. The only objection urged against it is the want of mutuality between the demands.

We have no statute defining what debts or demands are to be deemed mutual. The code provides (§ 93) that "the defendant may set forth, in his answer, as many grounds of defense, counterclaim and set-off as he may have, whether they be such as have been heretofore denominated legal or equitable, or both." But what is to be regarded as proper matter of legal or equitable set-off, so far as relates to the mutuality of claims, is left to be determined by the rules recognized by the courts of this country, and of that from which the principles of our jurisprudence are so largely derived—subject, however, to their constructive modifications by other provisions of the code.

It is undoubtedly well settled, as a general rule, both at law and in equity, that joint and separate debts can not be set off against each other. But whenever the character of the joint debt is such that one of the debtors is only surety for the other, and the separate debt is due to the principal alone, one of the main reasons on which the general rule is based does not exist; for the debts would be in reality between the same parties, and to set them off against each other would not complicate the rights of the parties, nor, ordinarily, embarrass the litigation of the claims. On the contrary, the set-off might settle all the rights of the parties in one action, and liquidate demands that in justice, between all the parties, ought to compensate each other.

Accordingly, it was held in Mahurin v. Pearson, 8 N. H. 539, that "in an action upon a promissory note against principal and surety, a demand due from the plaintiff to the principal may be set off." This decision, as gathered from the opinion delivered in the case, seems to have been based upon the equity of the case, requiring the creditor, who owes the principal, to give the surety the benefit of the debt which he owes the principal, and the further reason that the set-off would tend to prevent multiplicity of actions.

But in a later case in the same state (Andrews v. Varrell, 46 N. H. 17), where the general rule, that demands, to be set off, must be natural, was strenuously adhered to, it was, nevertheless, said: "It is not considered as conflicting with this rule to offset a note, signed by a principal and his surety, against a note running to such principal alone, the debt in such case being considered as the debt of the principal." Thus it seems to be settled in that state that the debt, though evidenced by a joint security, being in reality the debt of the principal, is deemed to be so far mutual to a separate demand of the principal that one may be offset to the other.

Upon the ground, coupled with the strong equity in favor of the set-off in such cases, the courts of other states have allowed it to be done in actions at law, though not especially authorized, as in some of the states, by statutory enactment. Brundridge v. Whitcomb, 1 Chip. 180; Ashley v. Willard, 2 Tyler 391; Stewart v. Coulter, 12

S. & R. 252; Solliday v. Bissey, 12 Pa. St. 347; Leach v. Lambeth, 14 Ark. 668; Kent v. Rogers, 24 Mo. 306; Newell v. Salmons, 22 Barb. 647; 2 Par. on Notes and Bills 608.

But this seeming, and, perhaps, real exception to the general rule, as applied to actions at law, unaided by statutory provisions, is not unquestionable. Our code, however, as we have seen, authorizes the defendant in an action to set up an equitable as well as a legal set-off. If, therefore, the set-off in question was available in equity before the code was adopted, it is equally so in the "civil action" by which, under its provisions, both legal and equitable remedies are administered.

In matters of set-off, equity follows the law, and will not allow a set-off of a separate debt against a joint debt, except where the circumstances of the case are such that some special equity may be invoked to justify such an interposition. Thus, in Brewer v. Norcross, 17 N. J. Eq. 219, it is said: "In cases of insolvency, or of joint credit given on account of individual indebtedness, or where the joint debt is a mere security for the separate debt of the principal, the equity is obvious, and the set-off will be allowed." So in Downer v. Dana, 17 Vt. 518, Redfield, J., says: "Although a court of equity will not, any more than a court of law, allow a set-off of joint debts against separate debts, yet there are many exceptions. One important exception is, where the debts are in reality mutual, although not so in form, as where one of the joint debtors is a mere surety."

It has sometimes been asserted that a set-off has been allowed on this ground only in cases of insolvency, and that the practice had its origin in the English statute relating to set-offs in bankruptcy; but this denied in Ex Parte Hanson, 12 Ves. 346, by Lord Erskine, who decided the case upon equitable principles as if the parties were solvent, and said that he was "not obliged to do more than courts of equity were in the habit of doing before the statute of set-off existed." The case was this: H. and W. were indebted on a joint bond to C. and P., who were bankrupts, and were indebted to H., who was principal on the bond, W. being surety only. The assignee brought suit on the bond, and H. petitioned to be allowed to set off his demand against the bond. The chancellor held that the assignee took subject to all the "equities" attaching to the bankrupts, if they had "continued solvent," and allowed the set-off, on the equitable ground of preventing circuity of actions, on account of the joint bond being that of principal and surety.

When the same case came again before the court, on the master's report, Lord Eldon approved the order of Lord Erskine, and said that it was "proper, under the circumstances, upon this ground; the joint debt was nothing more than a security for the separate debt; and, upon equitable considerations, a creditor who has a joint se-

curity for a separate debt can not resort to that security without allowing what he has received on the separate account, for which the other was a security." 18 Ves. 232.

Judge Story gives us an instance which justifies the intervention of a court of equity to set off a separate debt against one that is joint, that, "if one of the joint debtors is only a surety for the other, he may, in equity, set off the separate debt due to his principal from the creditor; for, in such a case, the joint debt is nothing more than a security for the separate debt of the principal;" and he adds that further ground of equitable interference quoted above from Lord Eldon. 2 Story's Eq., § 1437.

In Dale v. Cooke, 4 Johns. Ch. 11, Chancellor Kent arrived at the conclusion "that joint and separate debts can not be set off in equity any more than at law." But he seems to reconcile this view, with the right of a surety to set off a debt due from the creditor to the principal, on the ground that a joint debt is nothing more than a security for a separate debt of the principal. This case is, therefore, often cited to sustain a set-off in this class of cases. Indeed, the tendency of the American courts is to allow the set-off in such cases, on the ground that the real debts of the creditor and principal are mutual, though one may be evidenced by a joint security. On this ground a set-off, which in justice ought to be made between the parties, is held to be available at law. But however this may be, courts of equity lay hold of the case, and at once do justice to the parties, and prevent a multiplicity of suits. The convenience of such a course is a strong argument in its favor; for the rights of all the parties may thus be settled in one action instead of three, which might only result in taking the money from the surety on the joint debt by the creditor, and from him, on the debt of the principal against the creditor, and then from the principal to the surety, leaving the money where it started. The set-off, however, will do equal justice in one action, and let the money remain in the pocket of the creditor.

The manifest policy of the code is to obviate such circuity of actions; for it provides (section 95): "If the defendant omit to set up the counter-claim or set-off, he can not recover costs against the plaintiff in any subsequent action thereon;" and also provides (section 385) for judgment in his favor for any excess due him on the set-off, or for any affirmative relief to which he may be entitled. Moreover, the equity and right of a set-off in such cases is clearly recognized in the provision of the code (section 449) for certifying, in a judgment against principal and surety, which of the defendants is principal, and which is surety; and in directing that the property of the principal shall be taken in execution. In allowing such set-off, no more is done before judgment than the statute requires to be done after judgment on execution; indeed, it is the only manner in which the spirit of the statute can be made available without another action.

Since, then, a set-off, in cases like the one before us, might have been enforced in equity if not at law, before the code was adopted, it follows that, under the provisions of the code, it may be done in an action brought under it. The Court of Common Pleas, therefore, did not err in admitting the separate debt of the plaintiff due to the principal alone to be set off against the joint debt of the principal and surety. The judgment must therefore be affirmed.

Accord: Pickett v. Andrews, 135 Ga. 299, 69 S. E. 478; Reeves v. Chambers, 67 Iowa 81, 24 N. W. 602.

If the principal is insolvent, the surety when sued alone may assert the set-off of the principal. Jarratt v. Martin, 70 N. Car. 459; Scholze v. Steiner, 100 Ala. 148, 14 So. 552; Willoughby v. Ball, 18 Okla. 535, 90 Pac. 1017; Hiner v. Newton, 30 Wis. 640; Becker v. Northway, 44 Minn. 61, 46 N. W. 210, 20 Am. St. 543.

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CHAPTER V

SUBROGATION

SECTION 1. NATURE OF THE RIGHT OF SUBROGATION

MATHEWS ET AL., APPELLANTS, *v.* AIKIN, RESPONDENT

1 *N. Y.* 595 (1848).

Appeal from the Supreme Court in equity. Abraham Aikin filed his bill in the court of chancery before the vice-chancellor of the seventh circuit, against John Mathews and Oliver Orcutt, who appeared and defended, and against Edward Aikin, who suffered the bill to be taken as confessed. The case, so far as material to be stated, upon pleadings and proofs was as follows: On or before the 22d of November, 1837, Edward Aikin, who was the son of the complainant, executed to James Hasbrook a bond secured by mortgage on certain real estate, bearing date December 6, 1836, conditioned for the payment of $1,300 in six equal annual instalments. At the time of the execution of the bond and mortgage Edward Aikin was indebted to one Theodore Wood in the amount thereof, and Wood being also indebted to Hasbrook, procured the bond and mortgage to be executed directly to him. At the time or soon after the bond and mortgage were given, the complainant at the solicitation of said Wood and Hasbrook, executed upon the bond a sealed guaranty of the payment thereof. There was no evidence that the complainant executed the guaranty at the desire or request of Edward Aikin, the mortgagor. Edward Aikin was examined as a witness for the complainant, and on cross-examination testified that he advised his father not to sign the guaranty, informing him that he was under no obligation to procure a guaranty. On the 27th of August, 1841, the said Edward Aikin executed to the defendant John Mathews a mortgage upon the same premises, conditioned to pay the sum of $663.36. The mortgage to Hasbrook had been previously recorded, and Mathews had also actual notice of the existence thereof. On the 11th of February, 1843, Mathews having caused his mortgage to be foreclosed in chancery, purchased the premises at master's sale under the decree for the sum of $500, and procured the master's deed to himself.

After such purchase, and on the 26th of April, 1843, the personal representative of James Hasbrook (who had died) assigned the bond and mortgage first above mentioned to the defendant Oliver Orcutt. The consideration for this assignment was paid by Mathews, and such assignment was made in trust for him and for his benefit only. Immediately afterward, Mathews caused an action at law to be commenced, in the name of Hasbrook's representatives, against the complainant upon the aforesaid guaranty, and recovered judgment against him for the sum of $370.76, the amount of the last instalment due upon the bond and mortgage, the other instalments having been previously paid. The complainant thereupon tendered the amount recovered against him and demanded that Orcutt assign the bond and mortgage to him. This was refused; and the complainant then paid absolutely the sum, and demanded an assignment. This was also refused. At the commencement of this suit the defendant Mathews was in possession of the premises under his purchase at the master's sale above mentioned. Edward Aikin was insolvent. The complainant claimed by the bill to be subrogated to the rights of Orcutt or Mathews as the holder of the bond and mortgage for the purpose of reimbursing to himself the sum collected of him by suit on the guaranty; and the prayer of the bill was that such right of subrogation might be declared, and that the premises might be sold, etc.

The vice-chancellor decreed in favor of the complainant according to the prayer of the bill. The defendants appealed to the chancellor, and the cause then became vested in the Supreme Court organized under the new constitution; and that court sitting in the fifth district affirmed the decree of the vice-chancellor. The defendants appealed to this court.

Johnson, J.: It is a general and well-established principle of equity, that a surety, or a party who stands in the situation of a surety, is entitled to be subrogated to all the rights and remedies of the creditor whose debt he is compelled to pay, as to any fund, lien or equity which the creditor had against any other person or property on account of such debt. The general doctrine, as a rule of equity, is not controverted on the part of the appellants, but is fully conceded. It is insisted, however, by their counsel, that the guarantor in this instance did not become such at the request of the debtor; that as to the debtor, he was a mere volunteer, having no remedy over against him, and never acquiring the character of a surety so as to be entitled to be subrogated to the rights and remedies of the creditor.

The objection seems somewhat narrow and technical when addressed to a court of equity whose peculiar province is to mete out substantial justice where the more restricted powers of the common law fail in its administration. But it leads us to examine carefully into the grounds and principles upon which the right of subroga-

tion rests. Does it rest upon the foundation of a contract binding in a court of law between the debtor and his surety? In other words, does it turn substantially upon the question whether or not the surety who has paid the debt to the creditor has a remedy over, on his contract, against the principal debtor for money paid in an action at law? Or does it not rest rather upon the broader and deeper foundations of natural justice and moral obligation? Chancellor Kent says, in Hays v. Ward (4 John. Ch. 130), "This doctrine does not belong merely to the civil law system. It is equally a well-settled principle in the English law that a surety will be entitled to every remedy which the principal debtor has, to enforce every security, and to stand in the place of the creditor, and have those securities transferred to him, and to avail himself of those securities against the debtor. This right stands not upon contract, but upon the same principle of natural justice upon which one surety is entitled to contribution against another." Lord Brougham, in Hodgson v. Shaw (3 Mylne & Keene 183), said: "The rule here is undoubted, and is founded on the plainest principles of natural reason and justice, that a surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has for the purpose of obtaining his reimbursement. It is scarcely possible to put this right of substitution too high; and the right results more from equity than from contract or quasi contract unless in so far as the known equity may be supposed to be imported into any transaction, and so as to revise a contract by implication." Sir Samuel Romilly, in his argument in Craythorne v. Swinburne (14 Ves. 159), stated the rule to be that, "a surety will be entitled to every remedy which the creditor has against the principal debtor to enforce every security by all means of payment, to stand in the place of the creditor not only through the medium of contract but even by means of securities entered into without the knowledge of the surety, having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor." And this exposition of the rule was fully sanctioned by Lord Eldon in giving judgment in that case.

The equity is certainly as strong, and it seems to me somewhat stronger in favor of substitution, as against the creditor at least, than it is between sureties for contribution where one has paid the whole debt, and it has been likened to the case of contribution between sureties. As between them the rule in equity is clear that the ground of relief does not stand upon any notion of mutual contract express or implied, but arises from principles of equity independent of contract. Story's Eq. 493, and notes, where the authorities are all collected. This is also substantially the rule in courts of law. (Norton v. Coons, 3 Denio 130). In that case the circumstances under which the defendant became cosurety were such as to repel the presumption of any promise to make contribution. But the

court held that this being a surety on the same contract without qualification in terms was sufficient to fix the obligation to contribute, and that for the purposes of giving the plaintiffs a remedy the court would presume a promise. A promise was therefore imputed where none confessedly existed, in order to provide a remedy for the party where there was no doubt as to the legal liability; and the legal liability in such cases springs from the equitable obligation; the law courts having borrowed their jurisdiction in these particular cases from the court of equity. In the present case it seems to me, if it were necessary, a court of equity ought to imply a promise on the part of the creditor to subrogate the surety to all his rights and remedies, in case he resorted to the latter for payment of the debt upon his guarantee. The equitable obligation resting upon him to do so seems to me most manifest.

It is true, the case shows that the principal debtor informed the guarantor that he was under no promises or obligation to give security, which seems to have been insisted upon by the creditor, and that he advised his father not to give the guaranty. There is nothing however in the case to show that the debtor did not subsequently assent to it, even at the time the guaranty was executed or that the money was not paid at his express request afterward. But the case does show that the guaranty was executed at the repeated and urgent solicitations of Wood, the original creditor, and of Hasbrook, to whom Wood proposed to transfer the debt, and to whom, by arrangement between them, the bond and mortgage was executed. As to the creditor Mathews, therefore, who now stands in the place of Hasbrook, Abraham Aikin was not a voluntary surety for the debt of his son, but became so at his express request, or that of the mortgagee under whom he claims, and it seems to me, after Mathews has pursued Abraham Aikin to judgment and fixed his liability as surety for his son in a court of law, it does not lie with him to turn round and say he is a mere volunteer in assuming the obligation and paying the money, and therefore not entitled to the rights and privileges of a surety. The creditor should not be permitted in a court of equity to question the rights of the surety after the obligation has been incurred at his request, and he has fixed the character upon him by suit and judgment in a court of law. As to him at least, Aikin, the father, was surety for the debt of the son, and was compelled to pay the debt, or a portion of it; and it is immaterial as to the creditor what the state of the case is, or the legal rights are, as between the principal debtor and the surety. There is no reason why the creditor should set up a defense for the debtor. It is sufficient for him that he has received his debt of the surety, ~~to~~ ~~create~~ the obligation on his part to surrender to the surety the securities in his hands. He is not to litigate the rights of the debtor, and set up defenses for the latter which he, peradventure, might be too honest and conscientious to

set up against the securities in the hands of a surety who had paid his debt for him.

It might be different if the debtor himself was here urging this defense, and especially if he was able to show that the surety entered into the obligation, not only against his wish or request, but for some purpose of fraud or oppression, or to make him his debtor against his will, or, as suggested by the appellant's counsel, to compel him to pay a debt to which, as between him and the creditor, he had a good defense at law. In such cases a court of equity would not lend the surety its aid, as he would not come before it with clean hands. But this is no such case. The principal debtor is here made a party, and suffers the bill to be taken as confessed against him. He sets up no such defense, nor does he pretend that he is not liable, or that he is not under both a legal and a moral obligation to his surety to repay the money which the latter has advanced for him. Indeed he expressly swears that his father was a mere security for him for the payment of the bond, without receiving any consideration for becoming such a surety. It is true he also testifies that he advised his father not to sign the guaranty, but it is obvious to my mind that this was in reference to a claim made by the creditor upon the debtor, that he was under some obligation to give some additional security. This appears to me quite evident from the appellant's answer and the course of the examination. It is sufficient, however, as I apprehend, that the debtor sets up no defense of the kind, and, although a party, admits the validity of the respondent's claim and would not afterward be heard to allege it was illegal or invalid. Could the appellant Mathews be permitted to set up a defense so ungracious as against a surety whom he has compelled to pay his debt, he would be bound in order to make it complete to show, as I think, that the principal debtor resisted the surety's claim, and that the securities in the hands of the latter would be worthless, inasmuch as he could never enforce them against such principal. Otherwise the court would intend that the principal was willing to do what equity required him to perform.

But in addition to the general reasons against the creditor's resisting the claim of the surety to be subrogated, especially when the debtor makes no objection, there is, I think, in this case a particular reason why the appellant Mathews should not be heard to interpose such an objection. The case shows that he held a junior mortgage upon the same premises which he took with full knowledge of the existence of the present mortgage as an incumbrance upon the premises and subject to it; and that before he became the purchaser of the mortgage in question through Orcutt his trustee, he had foreclosed such junior mortgage and became himself the purchaser of the equity of redemption. At the time therefore that he became the assignee of the present mortgage he was the owner

of the premises subject to this mortgage, and held them as a fund for the payment of his debt. (McKinstry v. Curtis, 10 Paige 503; Russell v. Allen, id. 249; Cox v. Wheeler, 7 id. 248; Tice v. Annin, 2 John. Ch. 125.) It presents therefore the case of a creditor with the fund pledged for the payment of the debt in his hand, under circumstances which make it an inequitable satisfaction of the debt, collecting the debt over again out of the surety, and then refusing to surrender the fund to him. The legal presumption is that Mathews, when he purchased the premises at the sale under his junior mortgage only bid to the value of the equity of redemption, and he must be adjudged to hold them subsequently as a fund for the satisfaction of the prior incumbrance. And he might have been restrained in equity from proceeding to collect the debt afterward from the mortgagor, or in case the latter had paid it, he would have been entitled to have the mortgage foreclosed upon the premises for his benefit—within the principle of the cases last above cited.

At the same time Abraham Aikin was sued upon his guaranty he was ignorant that the assignment of the securities had been made to Orcutt as a mere trustee for Mathews, who was already the owner of the premises. And unless I greatly mistake the case, it exhibits strong marks of contrivance on the part of Mathews to discharge the premises from the incumbrance of the mortgage at the expense of Abraham Aikin. It seems to me quite clear, from the facts of this case, that the defense ought not to prevail.

But upon the general doctrine of subrogation, I agree fully with the learned judge who delivered the opinion of the Supreme Court, that the right of the surety to demand of the creditor whose debt he has paid, the securities he holds against the principal debtor and to stand in his shoes, does not depend at all upon any request or contract on the part of the debtor with the surety, but grows rather out of the relations existing between the surety and the creditor, and is founded not upon any contract, express or implied, but springs from the most obvious principles of natural justice. And if it were true that the surety in such a case as this could maintain no action at law against his principal for the money paid, I agree with the Supreme Court that it would furnish a still stronger case for subrogation. A court of equity would never presume that the principal would interpose such a defense. If the creditor has insisted upon the surety's discharging his obligations and liabilities as such, and fastened the character upon him by a judgment, he can not, after receiving from him his debt, turn round and deny him the rights of a surety. The creditor must then fulfil his obligation to the surety, and leave the latter and his principal to adjust or litigate their rights or claims as they may see fit. There is no hardship in this. The surety might have filed his bill and compelled Mathews to collect the debt out of his principal through the mort-

gage before resorting to him. And in such a proceeding Mathews might with the same propriety have set up as a defense that the surety was a mere volunteer and could have no redress against his principal, and ought not to insist upon his proceeding against the principal in the first instance. The injustice of the defense might be a little more apparent in that case, but none the more real. Had Abraham Aikin owned the mortgage and assigned it to Mathews or to his trustee with his guaranty upon it at his request, no one, I apprehend, would pretend that Aikin, upon payment on his guarantee, would not be entitled to have the mortgage again from the creditor. How is his equity weakened by the consideration that to enable Wood the mortgagee to sell it to Hasbrook he, at the request of both Hasbrook and Wood, became the guarantor? It seems to me to be considerably strengthened by the fact that he derived no benefit from the transfer—especially as a doubt has been raised as to his remedy over at law for money paid against the mortgagor. If Hasbrook would have been bound to surrender to Wood, had he been the guarantor and made payment, I do not see why he is not, to the representative of Aikin, who became guarantor for the benefit and at the request of both Wood and Hasbrook.

Decree affirmed.

See also McCormick v. Irwin, 35 Pa. St. 111.

LEVI H. MILLER *v.* EMANUEL J. STOUT, HENRY TODD AND WILLIAM A. ATKINSON

5 *Del. Ch.* 259 (1878).

THE CHANCELLOR: *When a surety or guarantor pays a debt of a principal, equity substitutes him in the place of a creditor, as a matter of course, without any special agreement to that effect.

Subrogation does not rest in contract, but is an equity resulting from the circumstances of the particular case.

It is enforcible in equity tribunals, because it is a matter resting in conscience and not in consent.

Upon the performance, by the surety, of his contract of suretyship, he is entitled to the original evidence of debt held by the creditor, and to any judgment into which the debt has been merged, as well as to all collateral securities held by the creditor.

By performing the contract of suretyship, the principal obligation is discharged as respects the creditor, but is kept alive between

*Part of the opinion omitted

the creditor, the debtor, and the surety, for the purpose of enforcing the rights of the surety.

Subrogation is a mode which equity adopts to compel the ultimate discharge of a debt by him who, in good conscience, ought to pay it, and to relieve him whom none but the creditor could ask to pay.

Being purely an equitable right, it is limited only by equitable considerations. It is not available or enforcible when there are subsisting and countervailing equities which forbid it.

He who asks it must work out his equities through those of the party to whose equities he seeks to be substituted. He can have no equity if such party has no equity. His equity must be clear, and not doubtful. While, as between him and the person to whose rights and equities he would be subrogated—as in the case of Huston's Appeal, 69 Pa. 485, referred to in the argument—there may be priority of right or claim or equity, there can be none against the party against whom he seeks subrogation, unless it is equitable as between that party and the party through whom he seeks to be subrogated. In other words, if the equity he seeks would not be enforcible in equity tribunals by the party through whom he seeks its enforcement against the party against whom it is sought to be enforced, then it is not enforcible by him as a party entitled to be substituted to an original equity.

In Journal Publishing Co. v. Barber, 165 N. Car. 478, 81 S. E. 694, Walker, J., says in part: "Let us consider for a moment the elementary conception of subrogation and its primary elements. It is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. The doctrine is one of equity and benevolence, and, like contribution and other similar equitable rights, was adopted from the civil law, and its basis is the doing of complete, essential and perfect justice between all the parties without regard to form, and its object is the prevention of injustice. The right does not necessarily rest on contract of privity, but upon principle of natural equity, and does not depend upon the act of the creditor, but may be independent of him and also of the debtor. While subrogation is not founded on contract, there must, in every case, where the doctrine is invoked, in addition to the inherent justice of the case, concur therewith some principle of equity jurisprudence as recognized and enforced by courts of equity. Where the right of subrogation exists, it is subject to prior equities and all the rules of equity. The subrogation just described is generally referred to as legal subrogation to differentiate it from conventional subrogation or subrogation arising from express contract between the payer and the debtor and creditor that the payer shall be subrogated, rather than from the automatic operation of a rule of law upon a given set of circumstances. Conventional subrogation or subrogation by act of parties may take place by the debtor's agreement that one paying a claim shall stand in the creditor's shoes, and furthermore can arise only by reason of an express or implied agreement between the payer and either the debtor or the creditor, and the agreement, like other agreements, must be supported by a consideration. It is not essential to subrogation by convention that the creditor should be a party to the agreement between the debtor and a third party, provided no intervening rights to the

security have occurred; but subrogation by convention is not applicable where it would prejudice the rights of innocent parties. 37 Cyc., pp. 363 et seq. The nature and grounds of subrogation are very clear. The difficulties arise in its application to the innumerable complications of business. The courts incline, however, rather to extend than to restrict the principle, and the doctrine has been steadily growing and expanding in importance, and is becoming more general in its application to various subjects and classes of persons, the principle being modified to meet the circumstances of cases as they have arisen."

LEWIS' ADMR. ET AL. *v.* THE UNITED STATES FIDELITY & GUARANTY CO. ET AL.

144 *Ky.* 425, 138 *S. W.* 305, *Ann. Cas.* 1913A, 564n (1911).

The question raised upon this appeal is, may a surety upon a distiller's bond, who has been compelled to pay to the government money for its principal, be subrogated to the rights of the government, and subject the property which was in lien to the government in satisfaction of its debt? The lower court held that the surety was entitled to this right. It is insisted that this ruling is wrong, for the twofold reason, first, that section 3465 of the federal statute in express terms denies to a surety upon a distiller's bond the right of subrogation, and, second, that as the surety in this case was compensated for its service, it was not entitled to the same rights and benefits as an accommodation surety.

As to the first proposition, the section of the statute relied upon, to wit, 3465, is a part of the Act of June 30, 1864, relating to internal revenue, and it reads as follows:

"An act entitled 'An act further to provide for the collection of duties on imports,' passed March 2, 1833, shall not be so construed as to apply to cases arising under an act entitled 'An act to provide internal revenue to support the government to pay the interest on the public debt and for other purposes,' passed June 30, 1864, or any act in addition thereto or in amendment thereof, nor to any case in which the validity or interpretation of said act or acts shall be in issue."

The Act of 1833 here referred to was an act providing for the collection of debts due by or to the government, and in said act there is a provision defining and fixing the rights of sureties who were compelled to pay the debt of their principal. The Act of 1864 makes no provision for the protection of sureties, and hence the rights of sureties not being fixed by the act, and there being nothing in the act denying to them the right of subrogation, their rights must be determined by the common law.

At common law it is well settled that one who is compelled to pay the debt of another is entitled to be substituted to the rights

of the creditor. As stated by Pomeroy in his Equity Jurisprudence, Vol. 6, § 921:

"Payment of the debt of another, as by a mere volunteer, will not, of itself, entitle the party making the payment to subrogation. Equity will relieve, in general, only those who could not well have relieved themselves, and these may be divided roughly into the three classes already suggested, that is: First, those who act in performance of a legal duty, arising either by express agreement or by operation of law; second, those who act under the necessity of self-protection; third, those who act at the request of the debtor, directly or indirectly, or upon invitation of the public, and whose payment are favored by public policy.

"When a party discharges an obligation in performance of a legal duty--that is, an obligation for the performance of which he was legally bound—but for which his liability was subsequent to that of another party, he is entitled to be subrogated to, and to have the benefit of, all rights of the creditor and all securities which may at any time be put into the creditor's hands by a party whose liability is prior to his own, or which the creditor may have obtained from such party."

The same rule is thus stated in A. & E. Encyc. of Law, 2d ed., Vol. 27, p. 207:

"The general rule is that a surety who pays the debt of his principal will be subrogated to all the securities, liens, and equities, rights, remedies and priorities held by the creditor against the principal, and entitled to enforce them against the latter in a court of equity or of equitable jurisdiction. His right to subrogation is not affected by the fact that he made no stipulation therefor at the time of payment of the debt of his principal, nor by the fact that he was then ignorant of the existence of such right; nor will the right be denied him on the ground that he assumed the obligation without being requested to do so by his principal."

The decisions of this court, as found in Highland v. Anderson, 17 S. W. 866; Dunlap v. O'Brannon, 5 B. Mon. 393; Burk v. Chrisman, 3 B. Mon. 50, support the principle that a surety who is compelled to pay the debt of his principal is entitled to subrogation. Unless this right to the surety must be denied because it has been compensated for its service in becoming surety, the judgment must be affirmed.

We are cited to no authority from any court of last resort denying to a surety the right to subrogation because he was a compensated or paid surety. Subrogation is allowed because the surety has paid the debt of his principal. Upon this ground the right rests. The question as to what induced the surety to assume the obligation can not be considered in determining his rights. The sole question is, has he been compelled to pay the debt of his principal? If he has he is entitled to be subrogated to the rights of the

creditor. It is common knowledge that guaranty companies have for many years been accepted as surety upon the bonds of fiduciaries, public officials, and others occupying relations of confidence and trust. Many times in innumerable instances and forms their right to subrogation has been asserted and upheld. This right, so far as we are advised, has never been questioned, and certainly not denied.

The case of Champion Ice Mfg. & Cold Storage Co. v. American Bonding Co., 115 Ky. 863, cited and relied upon by appellant, in support of his contention, that a compensated surety is not entitled to subrogation, is not in point. The obligation assumed by the bonding company was not a contract of suretyship at all. It became the insurer of the honesty of an employé. It alone signed the bond, and this obligation was treated as a policy of insurance and its liability fixed and determined by placing upon the bond that construction which has been adopted in determining the rights of litigants under policies of insurance.

Perceiving no error in the judgment it is affirmed.

The surety is entitled to be subrogated to securities in the hands of the creditor whether he had knowledge of them or not and whether they were acquired by the creditor before or after he signed as surety. Lake v. Brutton, 8 DeG., M. & G. 440; Dempsey v. Bush, 18 Ohio St. 376.

SECTION 2. PARTIES ENTITLED TO THE RIGHT

(a) One in Situation of a Surety

SCOTT'S APPEAL

88 *Pa. St.* 173 (1878).

Appeal of Samuel W. Scott, receiver of the National Bank of Waynesburg, from the decree of the court dismissing his exceptions to the report of the auditor appointed to make distribution of the proceeds of the sheriff's sale of the real estate of Godfrey Gordon.

The auditor found that B. F. Flenniken, who had been a member of the firm of Gordon, Campbell, Courtney & Co., during a period of about six months, retired from the firm in June, 1872, leaving Gordon and Campbell still members, Courtney having also retired about the same time. That Flenniken's withdrawal was entirely voluntary, with the mutual consent of the remaining partners, and with the agreement that he was to go out of the firm without profit, and that Gordon and Campbell, the remaining members, were to pay the debts of the firm, including the rent of the

storeroom and warehouse which they had rented in December, 1871, when the partnership was formed, from John Hays, in the city of Pittsburgh. That John Hays brought suits in the common pleas court of Greene county, Pa., to Nos. 293 December term, 1873, and 180 June term, 1874, for two quarters' rent of the storeroom and warehouse, and judgments obtained against Godfrey Gordon, B. F. Campbell and B. F. Flenniken, no service being had upon Courtney. The judgment of the appellant, Scott, against Gordon was to No. 212, June term, 1875. On April 6, 1874, and January 25, 1875, respectively, Flenniken paid the two judgments of Hays, and took assignments thereof. The auditor decided that Flenniken, holding these two judgments, was entitled to be subrogated to the rights of Hays as against Gordon and Campbell, and to share in the proceeds of Gordon's property. Scott filed exceptions to this report which the court dismissed, and hence this appeal.

Per curiam. A partner who goes out and for a valuable consideration is indemnified by his partners against all debts and liabilities of the firm, stands in the attitude of a stranger, as against a creditor of one of the partners for his individual debt, whose judgment has been obtained since his outgoing. He is therefore entitled to subrogation for a debt of the firm paid by him for which he was not liable as between himself and partners at the time of leaving the firm.

Decree affirmed, with costs to be paid by the appellant, and appeal dismissed.

See also Swan v. Smith, 57 Miss. 548.

(b) One Who Pays as a Mere Volunteer

CALEB A. L. SHINN *v.* THEODORE BUDD

14 *N. J. Eq.* 234 (1862).

The Chancellor: On the nineteenth of July, 1852, Charles Cotton, being seized in fee of a house and lot in Southampton, mortgaged the same to secure the payment of $225 to Isaac Hilliard. The mortgage was subsequently assigned to Andrew Fort.

On the first of March, 1856, Cotton died, and letters of administration upon his estate were granted to Shinn, the complainant. The personal estate proving insufficient to pay the debts, the administrator obtained an order of the orphans court to sell the real estate of the decedent for the payment of debts. In pursuance of this order, the mortgaged premises were advertised for sale by the administrator, and were struck off and sold to John Johnson for

$365.52. So far as appears by the evidence, neither the advertisement, the conditions of sale, the report of sale by the administrator, or the decree of confirmation, contain any reference whatever to the incumbrance upon the premises. On the thirteenth of November, 1856, a deed, in pursuance of the sale, was executed by the administrator to the purchaser. On the twenty-third of March, 1857, the title became vested in Thomas Kealy. Kealy died on the twentieth of June, 1858. The land was sold, under an order of the orphans court, by his administratrix for the payment of debts, and on the twenty-first of May, 1860, the title became vested in Budd, the defendant.

On the thirtieth of March, 1857, the complainant paid to Andrew Fort, the assignee of the mortgage, $112, the balance of principal and interest remaining due and unpaid upon the mortgage debt, and took his receipt therefor upon the bond. The bill is filed to enforce the incumbrance of the mortgage against the land in the hands of the defendant. The complainant asks to be substituted in the place of the assignee of the mortgage, and to be subrogated to his rights. The ground upon which the relief is asked is, that the purchaser at the administrator's sale took his title subject to the mortgage; that the sum due upon the mortgage was deducted from the amount of the purchase-money, and that the mortgage debt was paid by the complainant, not as administrator, out of funds belonging to the estate of Cotton, but out of his own funds.

The complainant's case, assuming it to be fully sustained by evidence, is briefly this: As administrator of the estate of Cotton, he sold the real estate of the intestate, by order of the orphans court, for the payment of debts. The property was sold for $365.52, the consideration expressed in the deed of conveyance, this constituting the entire value of the land clear of incumbrances. The amount due upon the mortgages, $112, was not paid by the purchaser. After the sale, the mortgage debt was paid by the complainant to the holder of the mortgage, who indorsed upon the bond a receipt in full of the debt. There was no assignment of the bond and mortgage. The estate of Cotton was settled as if the purchase-money had been paid in full by the purchaser. It was in fact advanced by the complainant out of his own funds. The mortgage remains in his hands uncanceled of record. This is stating the case most favorably for the complainant. He now comes into court seeking to enforce the mortgage against those claiming under his own grantee. He does not claim to hold the mortgage by assignment; but he asks, by subrogation, to be substituted in the place of the mortgagee, and to succeed to his rights.

Subrogation as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor, for the benefit of a third person,

takes place only for his benefit, who being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the incumbrances upon his estate, or of a co-obligor or surety who discharges the debt, or of an heir who pays the debts of the succession. Code Napoleon, Book 3, art. 1251; Civil Code of Louisiana, art. 2157; 1 Pothier on Oblig., Part 3, ch. 1, art. 6, 2.

"We are ignorant," say the Supreme Court of Louisiana, "of any law which gives to the party who furnishes money for the payment of a debt the rights of a creditor who is thus paid. The legal claim alone belongs not to all who pay a debt, but only to him who, being bound for it, discharges it." Nolte & Co. v. Their Creditors, 9 Martin 602; Curtis v. Kitchen, 8 Martin 706; Cox v. Baldwin, 1 Miller's Louis. R. 147.

The principle of legal substitution, as adopted and applied in our system of equity has, it is believed, been rigidly restrained within these limits.

In The Book of the United States v. Winston's Executors, 2 Brocken. R. 254, Chief Justice Marshall said: "If a security not assignable be discharged by a surety whom it binds, equity keeps it in force in his favor, and puts such surety in the place of the original creditor. But I think there is no case in which this has been done in favor of a person, not bound by the original security, who discharges the debt as a volunteer."

In Gadsden v. Brown, 1 Speer's Eq. R. 41, Johnson, chancellor, says: The doctrine of subrogation is a pure unmixed equity, and from its very nature could not have been intended for the relief of those who were in a condition and at liberty to elect whether they would or would not be bound, and so far as I have been enabled to learn its history, it never has been so applied. It has been directed exclusively to the relief of those who were already bound, and who could not but choose to abide the penalty. I have seen no case in which a stranger, who was in a condition to make terms for himself, and demand any security he might require, has been protected by the principle.

In Sanford v. McLean, 3 Paige 122, Chancellor Walworth states the principle with great clearness. "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor as a matter of course without any agreement to that effect. In other cases, the demand of a creditor, which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished."

The same doctrine will be found to be maintained in numerous other cases in the American courts. Hayes v. Ward, 4 Johns. Ch.

R. 130; Banta v. Garmo, 1 Sandf. Ch. R. 384; Wilkes v. Harper, 1 Comst. 586; Swan v. Patterson, 7 Maryland R. 164. See also Copis v. Middleton, 1 Turner & Rus. 224; Hodgson v. Shaw, 3 Mylne & K. 183; Williams v. Owen, 12 Simons 597; Bowker v. Bull, 1 Simons n. s. 29.

The complainant is clearly not in a position to claim the benefit of the principle which he invokes for his relief. He had no interest in the land subject to the mortgage for the protection of which it was necessary that he should pay the mortgage debt. He was under no obligation to pay it, as surety or otherwise, out of his own funds; on the contrary, it was his duty, as administrator of Cotton, to pay the debt out of that estate. He so understood his duty; for in the final settlement of his accounts as administrator, he charges himself with the entire proceeds of the sale, and claims credit for the payment of the mortgage debt out of the estate. If he chose to advance the mortgage debt out of his own funds for the convenience of the purchaser, he was in a situation to require a new mortgage, or such other security as he saw fit for his own protection. Having neglected to do so, he has no claim to protection in equity by being subrogated to the rights of the mortgagee.

The fact that the mortgagee has not been satisfied of record will not alter the case. The evidence shows that the mortgage debt is extinguished. The holder of the mortgage neither assigned, nor agreed to assign the security. Upon receipt of the money, he gave the administrator a receipt in full for the debt. But if the fact were otherwise, if the administrator held the bond and mortgage in his own hands undischarged and unassigned after the settlement of the estate of the intestate, this court would not interfere for his relief. It would be eminently dangerous to permit an administrator, after the settlement of an estate, to set up an uncanceled mortgage in his hands which it was his duty to have discharged, and which by his final settlement he alleges was discharged, as a subsisting incumbrance upon the title of the purchaser of the mortgaged premises, or those claiming under him.

Nor is the case aided by the fact that the defendant was apprised at the time of his purchase of the claim of the complainant. Notice of an equitable lien will operate to charge the estate in the hands of the purchaser, but no notice will serve to render operative as an incumbrance a claim in itself inequitable.

With this view of the principle by which the case must be controlled and decided, it is unnecessary to determine the disputed question of fact in the case. The facts have been assumed to be in accordance with the allegations of the complainant's bill. Whether they have been established in evidence, is in no wise material to the rights of the parties.

The bill must be dismissed with costs.

Accord: Hough v. Ætna Life Ins. Co., 57 Ill. 318, 11 Am. Rep. 18; Binford v. Adams, 104 Ind. 41, 3 N. E. 753; Smith v. Austin, 9 Mich. 465; Cape Girardeau Bell Telephone Co. v. Hamil's Estate, 134 S. W. (Mo.) 1103.

In Journal Publishing Co. v. Barber, 165 N. Car. 478, 81 S. E. 694, Walker, J., says in part: "Plaintiff was not a volunteer. It acted upon the bona fide belief, and had the right to do so, that Moore either owned the machine himself or had authority from his wife to sell it, if she owned it. There is no evidence that plaintiff did not act honestly in the transaction. It was attempting in good faith to protect its own interests in what it believed to be a rightful sale of the property to it. The fact that it may have been mistaken in this belief does not make it a volunteer or intermeddler who, having no interest to protect and without any legal or moral obligation, pays the debt of another, is not entitled to subrogation without an agreement to this effect, or an assignment of the debt, and that the payment by him absolutely extinguishes the debt. It always requires something more than the mere payment of a debt in order to entitle the person paying the same to be substituted in the place of the original creditor. There must be the discharge of a legal obligation for another who is under a primary obligation, for no man can make another his debtor without his consent, and only a creditor or person under liability can invoke the doctrine, there being no debt, there can be no ground for subrogation. Furthermore the payer must have acted on compulsion to save himself from loss, and it is only in cases where the person paying the debt of another stands in the relation of a surety, or is compelled to pay in order to protect his own interests or by virtue of legal process, that equity substitutes him in the place of the creditor without any agreement to that effect; in other cases the debt is absolutely extinguished. 37 Cyc. 375.

"Volunteers, in the absence of some special circumstance upon which they can base their claims, can obtain the equal right to be subrogated only by virtue of an agreement, express or implied, or by request by the debtor to pay, which is in effect an implied contract, or by ratification, or by taking an assignment of the debt. But payments made in ignorance of the real state of facts can not be said to be voluntary, and a person who has paid a debt under a colorable obligation to do so, that he may protect his own claim, or under an honest belief that he is bound, will be subrogated; and a person who mistakenly, but in good faith, believes that he has an interest in property, to protect which, he discharges a lien, is subrogated to the lien for his repayment; and subrogation is sometimes extended to cases of payment by persons not legally bound to pay, but who do so, not as volunteers, but with a well-founded expectation, justified by the conduct or contract of the debtor, that they will be entitled to hold the securities for their indemnity which the creditor had against the debtor; and in one jurisdiction it has been held that a stranger who pays a debt without request by the debtor, when his payment is not ratified by the debtor, may bring a suit in equity, praying relief in the alternative, that if the debtor do not ratify such payment the debt may be enforced in his favor as its equitable assignee, or, if so ratified, that he be decreed repayment of the amount paid for the use of the debtor. 'Payment under a moral obligation is not voluntary.' 37 Cyc. 376 to 379 and notes."

(c) The Creditor

MAURE *v.* HARRISON

1 *Eq. Cas., Abr.* 93, *Placitum* 5 (1692).

A bond creditor shall, in this court, have the benefit of all counter bonds or collateral security given by the principal to the surety; as if A owes B money, and he and C are bound for it, and A gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt.

Accord: Union National Bank v. Rich, 106 Mich. 319, 64 N. W. 339; Pendery v. Allen, 50 Ohio St. 121, 33 N. E. 716, 19 L. R. A. 367; Johnson v. Martin, 83 Wash. 364, 145 Pac. 429.

TAYLOR *v.* FARMERS' BANK OF KENTUCKY

87 *Ky.* 398, 9 *S. W.* 240 (1888).

This is a question of subrogation. October 10, 1877, William Timberlake drew a bill of exchange for seven thousand one hundred and forty dollars and three cents upon Henry C. Timberlake, payable to the order of John W. Menzies. It was indorsed by the latter, after having been accepted by Henry C. Timberlake, and then delivered to the latter and negotiated by him for his benefit.

March 18, 1878, the Farmers' Bank of Kentucky sued the three parties above named upon the bill, and subsequently recovered a judgment. Execution upon it was returned nulla bona, save about one thousand dollars, made out of the estate of William Timberlake, the Timberlakes and Menzies being insolvent. The latter was an accommodation indorser, and has never paid anything upon the judgment. March 21, 1878, the appellee, Susan A. Timberlake, her husband, Henry C. Timberlake, joining with her as a legal necessity to the step, mortgaged to John W. Menzies a tract of land belonging to her.

The condition of the mortgage is as follows: "This conveyance is made to secure, indemnify and save harmless the said Menzies against any loss he may sustain by reason of his indorsement of a draft, dated October 10, 1877, drawn by William Timberlake, on the said Henry C. Timberlake for his accommodation, at four months, for seven thousand one hundred and forty dollars and three cents, and indorsed by said Menzies, and negotiated by said Henry C. Timberlake for his own benefit, and upon which the Farmers'

Bank of Kentucky has brought suit in the Kenton Circuit Court; and if said Menzies is not required to pay any part of said claim, this conveyance will stand for naught, otherwise it will remain in full force. * * *

"The said Menzies is not to permit any loss to fall upon him which he can lawfully prevent, as this conveyance is for his benefit, and not made for the purpose of securing any part of said claim, which he may avoid by any and all lawful efforts."

December 7, 1882, the bank, by a written transfer, assigned the judgment to the appellants, together with "all the rights and equities of every kind or nature" connected with it.

Henry C. Timberlake died insolvent in 1880; and on December 12, 1882, the appellants brought this action, asking to be substituted in all the rights of Menzies under the mortgage of indemnity to him, and that the land of Mrs. Timberlake be subjected to the payment of their judgment.

The matters above recited are to be taken as true, as they are set out in the petition, and it was dismissed upon demurrer.

It is urged that there was no consideration to support the mortgage. It was executed after the bill of exchange, and indeed after suit had been brought upon it. If Menzies had paid anything, and were seeking to enforce the mortgage, suspicion arises from this record that if issue were made, and proof taken upon a plea of no consideration, it would be in his way.

The writing, however, imports a sufficient consideration. True, this presumption ceases when the party relying upon the writing undertakes to show the consideration by his pleading. (Steadman v. Guthrie, etc., 4 Met. 147.)

Here, however, the appellants did not do this; but merely state the purpose of the mortgage. The real question in the case is now reached. Had the bank a right to be substituted to Menzies' place under the mortgage? If so, then the appellants, as its assignees, have the same right.

The doctrine of subrogation comes to us from the civil law. It is not the creature of contract, but of natural equity, although it has been said that it may be modified by contract. It is applied between parties, where the circumstances require it, that essential justice may be afforded; but not where it will work injustice to others.

The rule is well settled that where a security is given by a principal to his surety, it operates eo instanti as a security to the creditor for the payment of his debt. This right of the latter can not be defeated even by the release or conveyance of the surety or mortgagee, unless the liability be contingent, save to a bona fide purchaser without notice; and if contingent, the surety can not defeat it after his liability becomes fixed. The reason of this rule is, that the security given by the principal debtor to his surety is regarded in equity as a trust fund for the payment of the debt. All the property of the

principal debtor is liable for his debt; and it does not lie in his mouth, therefore, to say that it is not in trust for the creditor when pledged to the surety as indemnity. The creditor may, through the medium of the surety, resort to the property thus placed in trust for the payment of the debt, and is invested by equity with all the rights of the surety.

In such a case the security is for the debt, as well as the ultimate protection of the surety. It is at once clothed with a trust character; and the creditor immediately requires a right and interest in it that can not be defeated by the act of the surety. He becomes a trustee for the creditor. So, too, upon like principles of justice or natural equity, where a principal indemnifies one of several sureties, he becomes a trustee for the others, and each is entitled to share the indemnity. The estate of the principal is liable for the debt, and his obligations to them are equal.

A different state of case is presented, however, where the contract of indemnity is by a stranger to the debt, and for the personal benefit of the surety merely, in opposition to the idea of a trust for the payment of the debt. In such a case the indemnity is not out of the estate of the principal.

It was said in the case of Osborne, etc., v. Noble, 46 Miss. 449: "We think the principle has been stated and enforced, that if the security be purely personal, as to indemnify and save harmless the surety, and not for the better protection of the debt, or intended as a fund for its payment, a trust does not attach to it for the creditor."

Here Mrs. Timberlake was in no way liable for the debt. The fact that she was the wife of Henry C. Timberlake makes no difference. The indemnity was not out of his estate. The wife was under no obligation to pay the debt; and must be regarded, as indeed she was, as a stranger to it. It was no fraud upon the creditor to merely indemnify the surety. As the property belonged to her, if the mortgage created no lien to secure the payment of the debt, then no trust was created in favor of the creditor, since it is certain that the bill of exchange was not accepted upon the faith of the indemnity. It was not furnished to the surety until long after the creation of the debt, and indeed not until suit was brought upon it.

Her contract must be regarded as one merely to save the surety harmless; as undertaking merely to indemnify him against the payment of the debt; and pledging the mortgage property to him for whatever he might be compelled to pay, and not as security for the payment of the debt. It is true the mortgage recites: "The said Menzies is not to permit any loss to fall upon him which he can lawfully prevent, as this conveyance is for his benefit, and not made for the purpose of securing any part of said claim, which he may avoid by any and all lawful efforts;" but when the entire instru-

ment is considered, it is evident the purpose was merely to indemnify Menzies.

This being so, no right of subrogation exists in behalf of the appellants. Their claim is not supported by that equity which would attach to it if the debt had been accepted upon the faith of an indemnity created by the mortgage for its payment.

These views are supported and ably enforced by the opinions in the cases of Leggett v. McClelland, 39 Ohio St. 624, and Macklin, etc., v. Northern Bank of Kentucky, 83 Ky. 314; and the judgment below is affirmed.

HAMPTON, ADMINISTRATOR, ET AL. *v.* PHIPPS

108 *U. S.* 260, 27 *L. ed.* 719 (1883).

Bill in equity by a creditor to obtain the benefit of securities held by sureties of the principal debtor.

The appellee, who was complainant below, was the holder, and filed his bill in equity, on behalf of himself and the other holders of bonds, executed and delivered by Theodore D. Wagner and William L. Trenholm, to the amount of $710,000, and paid to creditors in settlement of the liabilities of two insolvent firms, in which they were two of the copartners. These bonds were dated January 1, 1868. The payment of the principal and interest of each of these bonds was guaranteed, by writing indorsed thereon, by George A. Trenholm and James T. Welsman, who were sureties merely. These sureties entered into a written agreement each with the other, dated May 3, 1869, in which it was recited that, in becoming parties to said guaranty, they had agreed between themselves that the said George A. Trenholm should be liable for the sum of $400,000, and the said Jas. T. Welsman for the sum of $310,000, of the aggregate amount of the bonds, and no more, and that each would be respectively liable to the other for the full discharge of the said sum and proportion by them respectively undertaken, and that each would save and keep harmless and indemnify the other from all claim, by reason of the said guaranty, beyond the amount or proportion respectively assumed, as stated; and it was thereby further agreed that, at any time when either of them should so require, each should, by mortgage of real estate, secure to the other more perfect indemnity, because of the said guaranty. Thereupon, and on the same date, each executed to the other a mortgage upon real estate of which they were respectively the owner, the condition of which was that the mortgagor should perform on his part the said agreement of that date. The guarantors, as well as the principal obligors, had become insolvent before the bill was filed.

It also appeared that, of the sum of $573,300 due on account of

outstanding bonds, George A. Trenholm, one of the guarantors, had paid $108,454, leaving still due from his estate to make good the proportion assumed by him, $214,532; and that the proportion for which the estate of James T. Welsman, the other guarantor, was liable, was $250,314, of which nothing had been paid. The appellees claimed that the mortgages interchanged between the guarantors inured to their benefit as securities for the payment of the principal debt, and prayed for a foreclosure and sale for that purpose.

This was resisted by the appellants, one of whom, Hampton's administrator, as a judgment creditor of George A. Trenholm and James T. Welsman, claimed a lien on the mortgaged premises; the others, executrixes of James Welsman, deceased, being subsequent mortgagees of the same property.

A decree passed in favor of the complainants, according to the prayer of the bill, from which appeal was taken.

Mr. Justice Matthews delivered the opinion of the court. After reciting the facts in the above language, he continued:

The ground on which the court below proceeded seems to have been that the mortgages given by the cosureties, each to the other, were in equity securities for the payment of the principal debt, which inured to the benefit of the creditors upon the principle of subrogation.

The application of the principle of subrogation in favor of creditors and of sureties has undoubtedly been frequent in the courts of equity in England and the United States, and is an ancient and familiar head of their jurisdiction.

It was distinctly stated, as to creditors, in the early case of Maure v. Harrison, 1 Eq. Ca. Abr. 93, where the whole report is as follows:

"A bond creditor shall, in this court, have the benefit of all counter-bonds or collateral security given by the principal to the surety; as if A owes B money, and he and C are bound for it, A gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt."

And the converse of the rule was stated by Sir Wm. Grant in Wright v. Morley, 11 Vesey 12, where he said:

"I conceive that as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor."

And it applies equally between sureties, so that securities placed by the principal in the hands of one, to operate as an indemnity by payment of the debt, shall inure to the benefit of all.

Many sufficient maxims of the law conspire to justify the rule. To avoid circuity and multiplicity of actions; to prevent the exercise of one's right from interfering with the rights of others; to treat that as done which ought to be done; to require that the bur-

den shall be borne by him for whose advantage it has been assumed; and to secure equality among those equally obliged and benefited, are perhaps not all the familiar adages which may legitimately be assigned in support of it. It is, in fact, a natural and necessary equity which flows from the relation of the parties, and though not the result of contract, is nevertheless the execution of their intentions. For, when a debtor, who has given personal guaranties for the performance of his obligation, has further secured it by a pledge in the hands of his creditor, or an indemnity in those of his surety, it is conformable to the presumed intent of all the parties to the arrangement that the fund so appropriated shall be administered as a trust for all the purposes which a payment of the debt will accomplish; and a court of equity accordingly will give to it this effect. All this, it is to be observed, as the rule verbally requires, presupposes that the fund specifically pledged and sought to be primarily applied is the property of the debtor, primarily liable for the payment of the debt; and it is because it is so that equity impresses upon it the trust, which requires that it shall be appropriated to the satisfaction of the creditor, the exoneration of the surety, and the discharge of the debtor. The implication is that a pledge made expressly to one is in trust for another, because the relation between the parties is such that the construction of the transaction best effectuates the express purpose for which it was made.

It follows that the present case can not be brought within either the terms or the reason of the rule; for, as the property, in respect to which the creditors assert a lien, was not the property of the principal debtor, and has never been expressly pledged to payment of the debt, as no equitable construction can convert it by implication into a security for the creditor.

It is urged that the logic of the rule would extend it so as to cover the case of all securities held by sureties for purposes of indemnity of whatsoever character and by whomsoever given. But this suggestion is founded on a misconception of the scope of the rule and the rational grounds on which it is established. Of course, if an express trust is created, no matter by whom, nor of what, for the payment of the debt, equity will enforce it, according to its terms, for the benefit of the creditor, as a cestui que trust; but the question concerns the creation of a trust, by operation of law, in favor of a creditor, in a case where there was no duty owing to him, and no intention of bounty. A stranger might well choose to bestow upon a surety a benefit and a preference, from considerations purely personal, in order to make good to him exclusively any loss to which he might be subjected in consequence of his suretyship for another. In such a case, neither cosurety nor creditor could, upon any ground of privity in interest, claim to share in the benefit of such a benevolence.

There may be, indeed, cases in which it would not be inequitable

for the debtor himself to make specific pledges of his own property, limited to the personal indemnity of a single surety, without benefit of participation or subrogation; as, when the liability of the surety was contingent upon conditions not common in his cosureties, and which may never become absolute. Hopewell v. Cumberland Bank, 10 Leigh 206.

We are referred by counsel to the case of Curtis v. Tyler, 9 Paige 432, as an instance in which the rule has been extended, to securities in the hands of a surety not derived from the principal debtor. But the fact in that case is otherwise. The question was as to the right of an assignee of a mortgage to the benefit of the guaranty of one Allen to make good any deficiency in the mortgaged property to pay the mortgage debt. This bond has been given to one Murray, a prior holder of the mortgage, who had assigned it to the complainant. The court say, in the opinion, p. 436:

"In the case under consideration, Murray had assigned the bond and mortgage given to him, and had guaranteed the payment thereof to the assignee. He, therefore, stood in the situation of a surety for the mortgagor, when the latter procured the bond of Allen as a collateral security, or as a guaranty of the payment of his original bond and mortgage. The present holders are, therefore, in equity entitled to the benefit of this collateral bond, in the same manner and to the same extent as if it had been given to Murray before he assigned his bond and mortgage, and had been expressly assigned by him to Beers, and by Beers to the complainants."

It thus distinctly appears that the bond of Allen, which was the collateral security in controversy, was procured by and derived from the original mortgagor, the principal debtor. We have been referred to no case which forms an exception to the rule as we have stated it.

But the claim of the complainants fails for another reason. The right of subrogation, on which they rest it, is merely a right to be substituted in place of each of the cosureties in respect to the other, in order to enforce the mortgages given by them respectively according to their terms. But the conditions of those mortgages have not been broken, and the very fact, which is supposed to confer the right upon the creditor to interpose—the insolvency of the sureties—has rendered it impossible for either to fasten upon the other a breach of the condition of his mortgage. As neither can pay his own proportion of the liability they agreed to divide, neither can claim indemnity against the other for an overpayment. It is entirely clear, therefore, that neither of the sureties could be, under the circumstances as they appear, entitled, as mortgagee, to foreclose the mortgage against the other. The condition of each mortgage was, that the mortgagor would perform his part of the agreement and indemnify the mortgagee against the consequences of a

failure to do so. Unless one of them had been compelled to pay, and had in fact paid, an excess beyond his agreed share of the debt, there could have been no breach of the conditions of the mortgage, and consequently no right to a foreclosure and sale of the mortgaged premises. And the amount which the mortgagor would be required to pay, as a condition of redeeming the mortgaged premises, in case of foreclosure, would be, not the amount which the mortgagee, as between himself and the common creditor, was bound to pay on account of the debt, but the amount which, as between himself and his cosurety, the mortgagor, he had paid beyond the proportion which, by the terms of the agreement between them, was the limit of his liability. The mortgages were not created for the security of the principal debt, but as security for a debt possibly to arise from one surety to the other. As to which of them has there been as yet any default? Plainly none as to either. And yet the complainants assert the right to foreclose them both—a claim that is self-contradictory, for, by the very nature of the arrangement, it is impossible that there should be a default as to both. The fact that one mortgagor had failed to perform his part of the agreement could only be on the supposition that the other had not only fully performed it on his part, but had paid that excess against which his cosurety had agreed to indemnify him. There is, therefore, no right to the subrogation insisted on, because there is nothing to which it can apply.

It results, therefore, that the complainants were not entitled to participate in the benefit of the mortgages in question, nor to share in the proceeds of the sale of the mortgaged premises; but that the same should have been applied to the payment of the other judgment and mortgage liens upon the premises, in the order of their priority. The decree of May 29, 1879, therefore, being the one from which the appeal was taken, is reversed, and the cause remanded with directions to take such further proceedings therein, not inconsistent with this opinion, as justice and equity require.

Decree reversed.

SECTION 3. WHEN THE RIGHT ARISES

WILLIAM WILCOX ET AL. *v.* THE PRESIDENT, DIRECTORS AND COMPANY OF THE FAIRHAVEN BANK ET AL.

89 *Mass.* 270 (1863).

Bill in equity by sureties upon notes given by Reuben Fish to the Fairhaven Bank, seeking to compel the latter to apply the avails of certain securities held by them from Fish pro rata upon the notes signed by the plaintiffs. The case was reserved for the determina-

tion of the whole court by Dewey, J., upon facts which sufficiently appear in the opinion.

Merrick, J.: From the undisputed allegations in the bill and answer it appears that on the first day of December, 1857, Reuben Fish conveyed to the defendants certain personal property to be held by them as security for the payment of the several promissory notes and drafts for which he was then, or within two years thereafter might become, liable to them, either as promisor, acceptor, drawer or indorser. That this was the object and purpose of the conveyance is expressly stated and declared in the bond which was at the same time given by them and accepted by him, by the terms of which they obligated themselves to reconvey the property to him whenever he should pay such notes and drafts, or cause them to be fully paid and discharged. From all the property conveyed to them the defendants have since realized in money the sum of $2,936.12; and nothing further is expected or can be obtained from it. They claim the right to appropriate the whole of this sum to their own use, by applying $1,220.79 in payment of sundry notes made by said Fish and discounted by them between December 1, 1857, and November 7, 1859, for the payment of which they had no security other than the property mortgaged to them as before mentioned, and by applying the balance, to wit, $1,715.33, toward the payment of sundry other notes of said Fish due to them, part of which were indorsed by Holmes & Co., and the residue of them by James K. Turner. It is conceded that when these notes become due the said Fish, Holmes & Co. and Turner were, and that they still are, insolvent.

It is claimed by the plaintiffs, on the contrary, that the said conveyance of the said property to the defendants created a trust in favor of all the sureties and indorsers upon the several notes of said Fish discounted and owned by them; and that these sureties and indorsers, being equitable cestuis que trust, are entitled to have the proceeds of said property applied to their relief pro rata. And in support of this claim they cite and rely upon the decisions of this court in the cases of Eastman v. Foster, 8 Met. 19, and Rice v. Dewey, 13 Gray 47. The broad principle of equity affirmed in those cases, and upon which they were determined, is, that a mortgage made by a debtor to his surety, to secure the payment of certain debts for which the latter is liable, and to indemnify him therefrom, is not to be regarded simply as an indemnity to him, but that the estate of the mortgagor is to be treated as a security for the debt, of which the creditor may avail himself; or, if there be several debts, of which the several creditors may avail themselves in proportion to the amount of their respective claims. These cases thus show how property mortgaged to a surety may be reached and appropriated by the creditor or creditors to the payment of the debts severally due to him or them; but they do not show, nor was it therein determined, that a creditor holds the proceeds of property,

mortgaged to him to secure the payment of several notes due to him, as trustee for the several sureties thereon in proportion to the amount of their respective liabilities, unless these liabilities have been discharged by the payment of all the debts for which they were thus severally bound. These decisions are therefore manifestly not strictly applicable to the facts of the present case. It is, however, undoubtedly an established rule of equity that a surety who has paid the debt of his principal, either voluntarily or by compulsion, is entitled for his indemnity to any property pledged or collateral security given therefor by the principal to the creditor. But as this rule is founded on the principles of reason and justice, and not upon any contract or stipulation to that effect between the parties, it follows as a necessary consequence that a surety is not to be substituted in the place of the creditor, unless from the circumstances of the case it is shown that it is just and reasonable that he should be. Hence it is obvious that, in order to become entitled to such substitution, he must first pay the whole of the debt or debts for which the property is mortgaged or the collateral security is given to the creditor; for it would be manifestly unjust, and a plain violation of his rights, to compel him to relinquish any portion of the property before the obligation for the performance of which it was conveyed to him as security had been fully kept and complied with. Richardson v. Washington Bank, 3 Met. 536. Copis v. Middleton, 1 Turn. & Russ. 224; Hodgson v. Shaw, 3 Myl. & K. 183. Such previous payment by the surety is alike essential where there is only one debt and one surety, and where there are many debts all of which are equally protected and secured by the property mortgaged, and many several sureties of the several debts; for the chief and primary object of a pledge or mortgage to a creditor is his benefit, protection and advantage in reference to each and all of the several debts which it was made or given to secure. And until this object is fully accomplished, no surety can lawfully or justly interfere to disturb him in the possession of the property pledged, or hinder him from appropriating the proceeds of it toward payment of any such debt which he can not otherwise collect or render available. And if there be one or more debts thus secured for which the debtor alone is responsible, and the amount of which can not be obtained from him on account of his insolvency or pecuniary inability, such proceeds may be applied, as far as is necessary for that purpose, to the payment and discharge of such debts, and to that extent the sureties upon notes constituting other debts can have no interest in or right to the mortgaged property. But the several sureties, or any one of them, may, if they choose to do so, pay all the debts secured by the mortgage, and then be, or they will be entitled to be, substituted and stand in the place of the creditor. If the payment be made by one of them only, he will hold the property, subject to the rights of the others to come in and pay the amount of their respective liabilities,

for his own indemnity; if it be made by all of them, the payment will operate as a redemption of the property for their common benefit, and the proceeds of it will be held to be distributed among them in proportion to the amount of their respective liabilities. But until the whole of the debts due to the creditor and secured by the mortgage are paid or offered to be paid to him by all or by some one of the sureties, he has an undoubted right to the possession and control of the mortgaged property, and no proceedings can be had against him in reference to its disposal or appropriation.

In the application of these principles to the facts disclosed in the present case it is a necessary consequence that this bill can not be maintained. The plaintiffs have not paid, nor have they in their bill offered to pay, the whole or any part of the debts secured by the mortgage. They do not, therefore, show that they have any right of substitution, or that they are entitled to any relief. But the result is the same upon another distinct ground. The defendants have a right to appropriate the whole proceeds of the mortgaged property to the payment of the notes of Fish upon which he alone was liable, and of those other notes made by him upon which Holmes & Co. and Turner were respectively sureties, because by reason of the insolvency of all these parties nothing can be collected of them, and otherwise these notes would remain wholly unpaid. There is, therefore, nothing left for the sureties to redeem, or in respect to which a substitution in the place of the creditor would avail them anything. The bill must accordingly be dismissed.

T. D. MAGEE ET AL. *v.* JOHN LEGGETT, ADMR., ETC.

48 *Miss.* 139 (1873).

The estate of Stewart, deceased, recovered a judgment of the circuit court against the estate of Joshua R. White, deceased, and the estate of J. B. Hathorn, deceased, founded on a promissory note executed by said Hathorn and White in their lifetime, Hathorn having signed the note as surety for White. Ste

McNair, administrator of Stewart, transferred an interest, amounting to $160, in this judgment, to Wilkinson, who transferred this interest to Mrs. M. C. Magee, the present holder of this interest, leaving $406.20 of the judgment remaining due to McNair, administrator, besides interest thereon at ten per cent. per annum, from September, 1857, the date of the judgment.

On the 26th of September, 1866, the administrator of Hathorn, surety, paid to McNair $400, as a compromise and to procure a release of the estate of Hathorn.

On the 6th day of October, 1870, Leggett, administrator de

bonis non of the estate of Hathorn, filed his bill in the chancery court against the heirs-at-law of said White, deceased, demanding a decree against them for the amount so paid as a compromise to procure a release.

The adult heirs, defendants, demurred to the bill, which demurrer was overruled.

The complainant then filed an amended bill, being an exact copy of the original bill, except it contained a new allegation in the words following, to wit: "Your orator further represents and shows that the debt of your orator and that due Mary C. Magee are the only debts existing against the estate of the said White."

The adult defendants, heirs-at-law, also demurred to this amended bill, which demurrer was overruled; from the decree overruling their demurrer they appealed.

Simrall, J.: On the 26th of September, 1866, A. S. Harper, administrator of Hathorn, deceased, compromised with McNair, administrator of Stewart, deceased, the liability of his intestate, as surety on a note merged into a judgment, by paying $400, part of the debt, in consideration of which his intestate's estate was released and discharged from the debt. The bill seeks subrogation, pro tanto, to the rights of the creditor, to whom the payment was made.

The first question to be disposed of is, when does the statute of limitations begin to run?—that being set up as one of the special causes of demurrer.

If the complainant should be entitled to substitution at all to the judgment and its privileges, must suit be brought within the time limited for the assumpsit at law on the implied promise of indemnity?

It is too well settled to admit of controversy, that at law the cause of action in favor of the surety accrues when he pays the money, and from that time the statute of limitations begins to run. Scott v. Nichols, 27 Miss. 94; Marshall v. Hudson, 38 ib. 57; Dixon v. Miller, 11 S. & M. 594; Mathews v. Southeimer, 39 Miss. 174.

Conceding the surety may go into a court of chancery to be refunded what he has paid on account of his principal, the remedy is governed as to time, as in the suit at law. But if more be asked than the ordinary moneyed decree, as in this case, that the complainant shall have the benefit and privileges of the judgment, other considerations present themselves as to the propriety of that relief.

It was said in 4 Rand 444, and repeated in Growing v. Bland's Admr. and Heirs, 2 How. 815: "The surety is entitled to every remedy which the creditor has against the principal debtor; to enforce every security; to stand completely in the place of the creditor." In Conway v. Strong, 24 Miss. 666; Bowen et ux. v. Hoskins, 45 ib. 186; Osborn v. Noble, 46 ib. 453, the principle is declared that a secondary party, who has been obliged to discharge

the debt, has a right in equity to occupy the place of the creditor, and be subrogated to his rights against the party primarily liable, as to any lien or security which the creditor may have.

But it appears from the allegations of the bill, that the complainant's intestate paid only $400, part of the judgment; that the creditor assigned $160, of its amount, which by mesne assignment now belongs to Mrs. Magee. It thus appears that part of the judgment still belongs to the original creditor, and part to Mrs. Magee. It is plain that both of these parties are entitled to satisfaction of what may be respectively due them, out of the property pointed out in the bill, in preference to the reimbursement to the complainant, from that source, of what the estate which he represents has paid. Nor is it so much as averred that the property is of value to satisfy these claims.

In Berry, Use of Burgess v. Nicholls, 2 Harr. & Johns. 508; Merryman v. State, etc., 5 ib. 423, the sureties who had paid the amount of the judgment were permitted to sue out execution in the name of the judgment creditor, for their use, against the principal debtor. Equity treated the payment by the surety as working, by operation of law, a transfer of the judgment for his use, so as to give him the same process of recovery of the money which the creditor had. So far as we have examined, we do not find well-considered judgments holding that there can be a partial transfer by legal operation. A partial payment does not have that effect, unless it be a balance which satisfies what is due the creditor. In Hollingsworth v. Floyd, 2 Harris & Gill, 91, such assignment was repudiated and denied, where the surety had paid but part of the debt, and still owed a balance to the creditor; and also rejected as an anomaly a pro tanto assignment, the effect of which would be to give distinct interests in the same debt to both creditor and debtor.

The assignment to Mrs. Magee of part of the judgment, gives her an equal right pro tanto with the creditor. She would be protected in a court of law, in the use of its process to levy the debt compulsorily. If the complainant could be relieved in the mode specifically prayed, his right under the judgment would be subordinate to Mrs. Magee, and also to the creditor for any balance due him. It is distinctly declared in Garnett v. Blodgett, 39 N. H. 152, "that the surety's right could only accrue upon his payment of the whole amount of the creditor's claim." "The creditor's rights must be entirely divested before another can be substituted by mere operation of law, in his place, so as to have them vest in him." Stamford Bank v. Blodget, 15 Conn. 437; Belcher v. Hartford Bank, 15 ib. 381; Union Bank of Maryland v. Edwards, 1 Gill & Johns. 346. In Kyner v. Kyner, 6 Watts 227, the court says: "There shall be no interference with the creditor's rights or securities, which by possibility might prejudice or embarrass him in the collection of the residue of his debt. The surety must satisfy first his entire debt."

We do not understand the rule as requiring that the "surety" ~~must~~ make entire payment; it is enough if the creditor has been fully paid, part by the principal debtor, and part by the surety. In such case, subrogation will accrue pro tanto to the extent of his payment. Such would be the effect, if two or more sureties contributed in equal or unequal amounts to the payment. Bank of Pennsylvania v. Potaces, 10 Watts 152; Hardcastle v. Commercial Bank, 1 Harring 374. If these adjudications affirm the principle correctly, as we think they do, then the complainant can not be substituted to the place of the creditor against the principal debtor, because the surety has not entirely divested the rights of the creditor or his assignee, Mrs. Magee.

But notwithstanding, he sustains the relation to the principal debtor, of a creditor, for money paid on his account, which the debtor, ex equo et bono, is under a duty to refund, and may recover in this suit unless the remedy is barred. As we have seen, the cause of action arises from the payment to the creditor. In this case, the payment was made the 26th of September, 1866. The statute of limitations was then suspended, and so continued until twelve months after the close of the war. That was determined by the president's proclamation to have ended the 2d of April, 1866. The statute began then to run the 2d of April, 1867. The three years within which suit might be brought, expired the 2d of April, 1870. The bill was filed the 5th of October of that year, so that the remedy was cut off. It is not necessary to consider any of the other questions that would be raised upon the record.

It follows that there was error in overruling the demurrer of the defendants.

Decree reversed, and judgment here sustaining the demurrer and dismissing the bill.

Accord: Bank of Fayetteville v. Lorwein, 76 Ark. 245, 88 S. W. 919; Musgrave v. Dickson, 172 Pa. St. 629, 33 Atl. 705, 51 Am. St. 765; Cason v. Connor, 83 Tex. 26, 18 S. W. 668.

FORBES *v.* JACKSON

19 *Ch. D.* 615 (1882).

By an indenture of lease dated the 1st of July, 1854, certain premises situate at Islington were demised by Henry Witten to William Spence, his executors, etc., for the term of ninety-five years, from the 24th of June, 1852, subject to a yearly rent of £10 and the usual covenants.

By an indenture of mortgage dated the 28th of December, 1854, made between William Spence of the first part, the plaintiff J. S. Forbes of the second part, and A. Weir of the third part, William

Spence assigned the same premises unto A. Weir, his executors, etc., to secure the repayment of a sum of £200 and interest at five per cent.; and he also assigned to Weir a policy of assurance on his own life for £250. The legal estate in the premises was at the date vested in the plaintiff as the surviving trustee of a marriage settlement made in September, 1854, but which had ceased to have any effect. The proviso for redemption of the premises and policy was that on payment by William Spence, his heirs, executors, administrators, or assigns, of the sum of £200 to A. Weir, his executors, administrators, or assigns, he or they would reassign the premises and policy "unto W. Spence, his executors, administrators, or assigns, or as he or they should direct."

By the same indenture the plaintiff, for himself only, and not so as to bind his executors, covenanted with A. Weir, his executors, administrators, and assigns, that while the sum of £200, or any part thereof should remain owing he would pay unto A. Weir, his executors, administrators, and assigns, interest at five per cent., and also pay the premiums on the policy of assurance; and as a further security for the payment of the interest and premiums the plaintiff assigned unto A. Weir a policy of assurance on his own life for £100, and covenanted to pay the premiums.

The plaintiff joined in the mortgage as surety for William Spence, A. Weir having declined to advance the £200 to W. Spence unless the plaintiff entered into the covenants and made the assignment above mentioned.

Subsequently to the 28th of December, 1854, i. e., in May, 1856, August, 1863, August, 1864, and May, 1866, William Spence borrowed sums of money amounting to £530 from A. Weir, and by four indentures charged the same premises with the payment thereof and interest. The plaintiff had no knowledge of these advances having been made until the 6th of November, 1875. William Spence paid interest on the £200 until the 28th of June, 1867, and he also paid the premiums on his policy.

A. Weir died in September, 1878, having, by his will, made in 1874, appointed three executors, the defendants Jackson and Robins being two of them, and they, in September, 1878, made a demand upon the plaintiff for arrears of interest on the £200 from the 28th of June, 1867. The plaintiff paid the arrears, and also the interest which accrued due up to the 28th of December, 1879, under the mortgage of December, 1854, and he had also paid the premiums on the policy of assurance on the life of William Spence from the year 1868 up to the present time, and he had paid certain costs in connection with the mortgage.

On the 22d of December, 1879, the plaintiff gave to the defendants Jackson and Robins notice of his intention to pay off the £200, and on the 28th of June, 1880, he, in pursuance thereof, tendered that sum, together with the half-year's interest, and offered to pay

any costs properly payable in respect to the mortgage, and requested them to transfer to him all the securities comprised in the mortgage, including the leasehold premises, but they declined to accept the £200, and required the plaintiff not only to pay that sum, but also to pay the four other sums advanced to W. Spence, and the arrears of interest due thereon. They, however, offered to accept the £200, and to assign to the plaintiff the two policies of assurance, but they claimed to retain the leasehold premises as security for the other sums advanced.

The questions were, whether on payment by the plaintiff of the £200, and the interests, premiums, and costs (if any) due in respect of the mortgage of the 28th of December, 1854, he was entitled to have all or any of the securities comprised therein transferred to him, and to hold the same as security for the repayment of the sums paid by him under the mortgage; and by whom the costs of the action were to be borne.

The arguments which have been submitted on behalf of the executors do not affect the conclusion which I, in the course of them, intimated that I had come to; nor do they affect the principle laid down in the case of Newton v. Chorlton to which I referred on Thursday last. I consider that the decision in that case is perfectly good law, subject to this observation, that Vice-Chancellor Sir W. Page Wood expressed an opinion that where an additional security is taken by the creditor after the original security was given and the contract of suretyship entered into the right of the surety as regards the securities given to the principal creditor did not extend to the additional securities. The vice-chancellor did not think that the cases went so far as to give a surety the benefit of the security subsequently taken by the creditor. But that is a view which never commended itself to me, and it was certainly not adopted by Lord Justice Knight Bruce and Lord Justice Turner in a case before them of Lake v. Brutton, 8 D. M. & G. 441, and I may observe that Vice-Chancellor Sir W. Page Wood himself, in a case afterward before him of Pledge v. Buss, Joh. 663, 668, stated that his judgment in that case had been disapproved of by those lord justices, although not absolutely overruled. The vice-chancellor added: "I am as much bound to submit to their opinion as if the decision had been reversed on appeal before them." The vice-chancellor did not mention the names of the cases to which he referred, but I may state that some twenty years ago in my copy of Mr. Johnson's reports I noted against Pledge v. Buss the case of Lake v. Brutton as being the one which the vice-chancellor had in his mind, and there is also another case of Pearl v. Deacon, 1 De G. & J. 461, which I thought was referred to by him. That was an appeal from a decision of the late Master of the Rolls (Sir John Romilly), 24 Beav. 186. It was the case of a subsequent se-

curity; but it is not material for my purpose to consider the general question whether there has been a release, or what is the effect of taking an additional security, and then whether that additional security should be held available for the benefit of the surety. There has never been, so far as I know, any disapproval of the general principle which was laid down by the vice-chancellor in Newton v. Chorlton, 10 Hare 646, except so far, if at all, as the Master of the Rolls may have dealt with it in Farebrother v. Wodehouse, 23 Beav. 18, where he seems to have followed the case relied upon here of Williams v. Owens, 13 Sim. 597, which certainly, if it were law, would be an authority in favor of the executors. In the case of Newton v. Chorlton the principle laid down by Vice-Chancellor Sir W. Page Wood was that a surety was to have the benefit of all securities, "whether by way of suretyship or mortgage," and he afterward added 10 Hare 652: "The surety has a right at any moment to every security held by the creditor at the date of the contract—it has never yet gone beyond that; and he has further a right to say, you must always hold yourself in a position to be put in motion, at any request, against the principal debtor." I consider that the decision in Newton v. Chorlton, 10 Hare 646, was carried higher by the decision of the Lord Justices in Lake v. Brutton, 8 D. M. & G. 441, which, as I have said, the vice-chancellor himself recognized in Pledge v. Buss, Joh. 663, 668, and I consider the decision must be applicable to securities taken subsequently to the original mortgage. The Master of the Rolls in Farebrother v. Wodehouse, 23 Beav. 18, appears to have followed Williams v. Owen, 13 Sim. 597, as it applies to a subsequent security taken by the original creditor—that he could make advances to the debtor, and that they would prevail over the right of the surety. That principle is entirely at variance with the decision in Newton v. Chorlton, and it is a singular circumstance that in a subsequent case of Drew v. Lockett, 32 Beav. 499, before him, although he had followed Williams v. Owen, Lord Romilly said, Ibid. 505: "I am of opinion that a surety who pays off the debt for which he became surety must be entitled to all the equities which the creditor whose debts he paid off could have enforced, not merely against the principal debtor, but also as against all persons claiming under him." It was odd that Lord Romilly should agree with the principle laid down in Newton v. Chorlton, and yet come to a conclusion in Farebrother v. Wodehouse which seems to be at variance with it. The principle on which Vice-Chancellor Sir W. Page Wood proceeded was the same as laid down by Lord Eldon in the case of Mayhew v. Crickett, 2 Sw. 185, which I consider a leading authority, and also laid down in earlier cases: that the surety is entitled to have all the securities preserved for him, which were taken at the time of the suretyship, or, as I think it is

now settled, subsequently. Nor does it matter at all in principle, whether the creditor takes a further security for further advances made prior to the time when the surety makes payment of the debt. They have nothing to do with the surety. He is entitled to the benefit of the securities, though his payment be not made until after the time when the further advances were made by the creditor. The principle is that the surety in effect bargains that the securities which the creditor takes shall be for him, if and when he shall be called upon to make any payment, and it is the duty of the creditor to keep the securities intact; not to give them up or to burthen them with further advances. The same principle was enunciated in the case of Duncan, Fox & Co. v. North and South Wales Bank, 11 Ch. D. 88, where the Master of the Rolls on the hearing upon appeal from the judgment of Vice-Chancellor Little said, Ibid. 95: "It can not be said that in every instance a surety is entitled to stand in the place of the principal creditor as regards other securities. That is true as regards securities given by the debtor, but it is not true as regards securities given by cosureties." But here I have nothing to do with the question which was decided in that case—a question between persons alleged to be cosureties. That case was carried to the House of Lords, and is reported in 6 App. Cas. 1. The House of Lords, though they reversed the judgment of the Court of Appeal, did not say anything which affected the principle referred to by the Master of the Rolls, and which is all that I desire to notice. I consider that the principle laid down in that case is perfectly plain and right; and also that the decision in Williams v. Owen, 13 Sim. 597, is not law now, and can not, after the cases to which I have referred, be followed. I decline to recognize it. There is another case to which I desire to refer, that of Green v. Wynn, Law Rep. 4 Ch. 204, in which there was a surety, and Lord Hatherly said, Law Rep. 4 Ch. 207, "but where there is a mortgage of course any person under a liability to pay the interest would be at liberty to redeem." I am of opinion, therefore, that the plaintiff was right in his offer to pay off the debt, and that he is entitled to have the securities, and to say that the further charges for the sums subsequently advanced are inoperative as against him. The defendants, the executors, having refused the offer made, and being wrong in insisting on retaining the securities for the subsequent advances, must pay the costs of the action.

The declaration will be that on payment to the executors of what shall be found due for principal, interest, and costs in respect to the mortgage of the 28th of December, 1854, the plaintiff is entitled to have the securities comprised in the deed transferred to him, and to hold them as securities for the repayment to him of the sums which may be paid to the executors by him. The costs of the plaintiff will be deducted from the sum which he may be required to pay, as in Wheaton v. Graham, 24 Beav. 483; but the in-

terest will not be stopped as from the date when the offer of payment was made.

Accord: National Exchange Bank v. Silliman, 65 N. Y. 475; Drew v. Lockett, 32 Beav. 499.

SECTION 4. TO WHAT SECURITIES AND REMEDIES THE RIGHT EXTENDS

COPIS *v.* MIDDLETON

Eng. Mews. Turner & Russell 224 (1823).

This suit was instituted by creditors for the administration of the estate of John Knott, who died on the 28th of December, 1792, and by the decree made upon the hearing of the cause, dated the 25th of November, 1796, it was referred to the Master to take an account of the debts of the said John Knott, and it was ordered, that the Master should inquire and state to the court, whether the defendant Newman Knott had paid any and what debts of the said John Knott, as surety for him, or any and what money in respect of any such debts, and whether the said Newman Knott received any and what consideration, satisfaction or indemnity in respect of any or either of the said debts, and to what extent, together with the nature of such security, satisfaction or indemnity.

The Master by his report, dated the 20th of May, 1815, certified that the specialty debts of the said John Knott amounted to £16,085, and he further certified that it appeared by the evidence brought before him, that the said Newman Knott became surety for the said John Knott to a considerable amount, and paid various sums of money on account of such suretyship, and that he did not find that the said Newman Knott received any consideration, satisfaction or indemnity in respect of any of such debts. In the schedule to his report, the Master included the representatives of the said Newman Knott, and one John Martin, as specialty creditors of the said John Knott, in respect of sums paid by the said Newman Knott and John Martin, respectively, in discharge of the principal and interest of certain bonds entered into by them as sureties for the said John Knott, and he allowed interest upon such principal sums.

The bonds in which Newman Knott was surety, were dated respectively the 8th of August, 1781, and the 10th of January, 1792, and were joint bonds, executed by him and the said John Knott, to Richard Fogden and Thomas Turgis respectively, and were conditioned for securing the respective sums of £800 and £300. The principal and interest remaining due upon these bonds was paid by Newman Knott after the death of John Knott. The bond in

which John Martin was surety, was dated the 8th of October, 1791, and was also a joint bond, executed by him and the said John Knott to John Boniface, and conditioned for securing the sum of £250. The principal and interest due upon this bond was paid by Martin in the lifetime of John Knott, and the bond was assigned to Martin.

These facts were brought before the court by two exceptions taken by the plaintiffs to the Master's report, by which it was insisted that the Master, under the circumstances, ought not to have considered as specialty debts the sums paid by the said Newman Knott and John Martin in respect to the specialty debts of the said John Knott, but ought to have considered such sums as simple contract debts only, and ought not to have allowed interest thereon, inasmuch as the said Newman Knott and John Martin, in making such payments, did, as the plaintiffs submitted, virtually cancel the bonds and specialties, and put themselves in the situation of simple contract creditors of the said John Knott.

THE LORD CHANCELLOR: The facts of this case are simply these, two individuals gave a bond, the one as principal, and the other as surety; no other assurance was executed at the time, no mortgage was made to secure the debt, no counter-bond was given by the principal to the surety; and the question to be decided is, whether the surety, having paid the bond after it was due, is a simple contract, or a specialty creditor. I understand it to have been the opinion of the Master, an opinion founded on one or two cases which have been stated, that the surety was to be considered as a specialty creditor to stand in the place of the person whom he paid; that doctrine appears to me to be contrary to all that has been settled during the whole time I have been in this court; everything that was arranged in bankruptcy before the late statute enabling the surety to prove, everything determined before appears to me to have authorized the court to consider it quite clear, that if there was nothing in the case beyond what I have stated, the surety, having paid the bond, could be nothing more than a simple contract creditor in respect of that payment; the bond was not assigned to anybody in consideration of a sum of money paid, which was one way we used to manage these things; there was no counter-bond given, which was another way in which we used to manage these things, so that if the surety paid one bond he became instantly a specialty creditor by virtue of the other bond. If any suit was now instituted, I apprehend the payment of the bond would show that the bond was gone. There has been a case cited where, upon the general ground that a surety is entitled to the benefit of all securities which the creditor has against the principal, it seems to have been thought that the surety was entitled to be as it were a bond creditor by virtue of the bond; I take it to be exceedingly clear if, at the time a bond is given, a mortgage is also made for securing the

debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee, and as the mortgagor can not get back his estate again without a conveyance, that security remains valid and effectual security, notwithstanding the bond debt is paid; but if there is nothing but the bond, my motion is, that as the law says that the bond is discharged by the payment of what was due upon it, the bond is gone, and can not be set up. That is the opinion which I formed of this case.

Exceptions allowed.

JOHN H. LUMPKIN, ADM., *v.* AMBROSE MILLS

4 *Ga.* 343 (1848).

By the court. NISBET, J., delivering the opinion.

This was a bill filed by the plaintiff in error, as administrator, to marshal the assets of his intestate. The defendant in his answer set forth that as surety for the plaintiff's intestate upon a note of hand under seal, he had paid the debt of his principal, and therefore claimed in equity, to be subrogated to the rights of the creditor, and to come in, in the marshalling of the assets, as a bond creditor. The plaintiff in error claims that he is only an open account creditor. The question, therefore, and the only question made upon this record, is this: Can a surety, in equity, upon the settlement of an insolvent estate, who has paid a debt of his principal, due upon an instrument under seal, be subrogated to the rights and substituted to the position of the creditor, so as to come in as a creditor under that instrument, or is he entitled only as a creditor by open account?

(1) It is conceded in the outset, that the authorities upon this subject do not run a uniform course. The early English cases are with the defendant, and recognize the right of subrogation. Cases of the very highest authority in Great Britain, decided since our revolution, settle the rule differently, and deny his right to be paid, otherwise than as a creditor by open account. The American authorities are also in conflict, but we think their preponderance is in favor of the early British rule. The civil law also sustains that rule, and so do the authorities in those countries where the civil law is recognized. We think, upon principle, the rule of the British courts, anterior to our revolution, right. If it was not, it is obligatory upon us as law. The civil law is the parent of that rule—as it is, in truth, of many, very many of the principles of equity, which obtain in the English chancery courts. That code is not of binding authority upon us, but I recognize in it, in reference to many titles of the law, and among them that of principal and

surety, the very best system extant. Its broader, and more reasonable, and less fettered equity, is gradually being transferred into American jurisprudence. And where authorities are in conflict and principles doubtful, a court does well to allow the Roman law to quiet the conflict and dispel the doubt. We have no difficulty, either upon authority or principle, in settling, as the rule of this court, that a surety who has paid the debt of his principal is, in a court of equity, entitled, in all respects, to occupy, in the distribution of his estate, the place of the creditor.

It is a well-settled doctrine of the common law, that a surety upon payment of the debt of his principal, is entitled to an assignment of all the independent securities in the hands of the creditor, with all the remedies which he had to enforce them against the principal. The Roman law goes farther. By that law, not only is he entitled to these securities, but he is also entitled to be substituted as to the very debt itself, to the creditor, by way of cession or assignment. The debt in favor of the surety is treated, not as a paid, extinguished debt, but as sold to him—all its original obligatory force continuing against the principal. The surety is viewed in the light of a purchaser. * * *

The courts of Great Britain, in some of the earlier cases, enlarged the rule that I stated was settled, to wit: that a surety is entitled to the independent collateral securities, with all the creditor's remedies to enforce them against the principal; and held that the surety should be also entitled to an assignment of the very debt itself; thus going the full length of the civil law, and subrogating him fully to the rights of the creditor. The rule thus enlarged, we recognize as the common-law rule, at the time we adopted it. In Ex parte Crisp, Lord Hardwick said, that where a surety paid off a debt, he was entitled to have from the creditor, an assignment of the security, to enable him to obtain satisfaction for what he has paid beyond his proportion. 1 Atkins 133. In Morgan v. Seymour, the court decreed that the creditor should assign over his bond to the two sureties, to enable them to help themselves against the principal debtor. 1 Ch. R. 64. The principle was applied in a very strong case in Vernon. The principal had given bail in an action, and judgment was recovered against the bail. Afterward the surety to the original debt was called upon and paid it, and it was held that he was entitled to an assignment of the judgment against the bail. So that, although, the bail was but a surety, as between him and the principal debtor, yet coming in the room of the principal, as to the creditor, it was held that he likewise came in the room of the principal debtor, as to the surety. This case establishes that the surety had precisely the same rights that the creditor had, and shall stand in his place—a case of entire subrogation. Parsons v. Briddock, 2 Vernon 608. These three cases are anterior to the era of the revolution, and demonstrate how the

law stood at that time; and considering that we are not at liberty to depart from the common law, as it then stood, and that up to that time the rule was not seriously questioned, we might stop the review here. It may, however, be more satisfactory to press the discussion through the course of this question, down to the present moment, and to look into the reasonableness of the modern English rule. Other cases since that era recognize the doctrine as held in the three cases referred to.

It is nevertheless true, as Mr. Story states, that the rule is now different in England. Without following the authorities minutely through, it may be stated that the late rule, which denies the right of the surety to a cession of the debt itself, and to a perfect substitution for the creditor, rests chiefly upon two comparatively recent cases, determined by two of the ablest chancellors of England. I allude to the case of Copis v. Middleton, 1 Turner & Russ. 224, determined by Lord Eldon, and Hodgson v. Shaw, 3 Mylne & Keene 183, determined by Lord Brougham. These are names of pre-eminent authority, and their weight settles all controversy about the matter at this moment, in England. It is not a little remarkable, that names of authority equally conclusive, on this side of the water, are arrayed against these potent chiefs of the English chancery, to wit: Marshall and Kent. Neither Lord Eldon nor Lord Brougham questions the rule, that a surety is entitled to an assignment of the collateral securities. The former said, "It is a general rule in equity, that the surety is entitled to the benefit of all the securities which the creditor has against the principal. But then the nature of those securities must be considered. When there is a bond merely, if an action was brought upon the bond, it would appear upon oyer of the bond, that the debt was extinguished. The general rule must be qualified, therefore, by considering it to apply to such securities as continue to exist and do not get back upon payment to the person of the principal debtor." Lord Brougham says: "Thus the surety paying is entitled to every remedy which the creditor has. But can the creditor be said to have any specialty, or any remedy or any specialty, after the bond is gone by payment? The surety may enforce any security which the creditor has, but by the supposition, there is no security to enforce, for the payment has extinguished it." The whole of this reasoning is founded upon the technical idea, that the payment by the surety is an extinguishment of the debt; and being so extinguished, if the evidence of it were assigned to the surety, it will avail him nothing. It may be true, that in a suit on the bond in the case at this bar, by the surety, he might be met and defeated by a plea of payment. Be it so. We are not in a court of law. And really, it would seem that the reasoning of these great chancellors would rather fall appropriately from the lips of Lord Kenyon or Mansfield in a court of law, than from

theirs in a court of equity. For it will be seen that the rights of the surety in this matter depend upon no such subtle technicality, but upon an equity, which springs out of the fact of payment, and out of his relation to the principal debtor. It may be well questioned whether upon principles of common sense and common equity, the payment by a surety out of his own funds, of the debt of another, in the consideration of which he was not at all interested, ought to be considered, as to the surety, an extinguishment. Upon a question as to the right of subrogation, a chancellor ought not so hold it. These cases go upon the fact that the debt is in law extinguished. The civil law, addressing itself to the equity of the transaction, will not admit that it is extinguished, but bought by the surety. A purchaser of a negotiable security for value would, upon the instrument, acquire the rights of the original creditor. How can he occupy a position in a court of equity, more favorable than a surety! The equities are stronger in favor of the surety. Whilst upon this phase of the argument, it may be well to say, that it is quite immaterial whether there is in point of fact an assignment of the debt or not; for if upon equitable principles the surety is entitled to it, chancery will consider that as done, which ought to have been done. 12 Wheat. 596. And if necessary, would decree an assignment to be made. Equity will not permit the creditor to prejudice the rights of the surety, by a refusal to make an assignment. Upon what principle is it that the surety is entitled to the collateral securities in the hands of the creditor? It is not by virtue of a contract between him and the principal. The only contract between them, is the implied contract which results from the relation of principal and surety. And that is, that if the surety is compelled to pay the debt, the principal will reimburse him. It is upon this implied contract that the surety is entitled to his action for money paid to the use of his principal. This contract does not give him the right to the collateral securities. How then do Lords Eldon and Brougham arrive at the right of the surety to the collateral securities? It is by invoking the equity which flows necessarily out of the payment and relationship of the parties. Hear what Lord Brougham says: "The rule here is undoubted, and it is founded upon the plainest principles of natural reason and justice, that a surety paying off a debt, shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining reimbursement. It is hardly possible to put this right of substitution too high, and the right results more from equity than contract or quasi contract, unless, in so far as the known equity may be supposed to be imputed into a transaction, and so to raise a contract by implication." Now, what I have to say in reference to this reason, is this: it applies in equal force in favor of the surety's right to a transfer of the debt itself, as in favor of his

right to a transfer of the collateral securities. He is entitled to the latter, not by contract, but according to principles of natural reason and justice. By these principles he is made to stand in the place of the creditor. And so standing, the right to the collateral securities follows. Here is the doctrine of substitution recognized, and the powers of a court of chancery are invoked to give it effect. The doctrine once admitted, and it seems to me impossible to escape from the conclusion, that whatever are the rights of the creditor, anterior to the payment, and subsisting at the time, they devolve upon the surety. The principles of natural reason and justice pass then to him. And one of these rights, in the case before us, is to be let in, in the distribution of the estate of the debtor, as a specialty creditor, if the debt had not been paid by the surety. He paying it, is subrogated to that right. He is clearly as much subrogated to that right as he can be to the right of enforcing a mortgage or any other collateral security. I can not, I do not recognize the conclusiveness of the reason, that the bond is paid, and therefore, as to that right, the substitution can not take place. The substitution of the surety is not for the creditor as he stands related to the principal after the payment, but as he stood related to him before the payment. He is subrogated to such rights as the creditor then had against the principal. One of which unquestionably was, to enforce his bond against the principal, and if he was insolvent, to be let in as a bond creditor. What difference is there between permitting a surety to reimburse himself out of a mortgage lien held by the creditor, and permitting him to take out of the estate generally of the principal, the amount he has paid? If he realizes upon the mortgage, he abstracts the amount which he has paid from the estate of the principal—if he realizes on the bond, the mortgaged property goes back into the common fund, and the result to him and to other creditors is the same. The very fact that the surety could not enforce the bond at law is a reason in equity why he should be allowed to come into the distribution as a bond creditor. * * *

In the New York chancery, it may be assumed as an incontrovertible fact, that the rule of the civil law prevails. There a surety who has paid the debt is considered as a purchaser of the security upon which it is founded. Chancellor Kent, in Cheeseborough v. Millard, says: "If a creditor to a bond exacts his whole demand of one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities, as if he was a purchaser, either against the principal debtor or the cosureties." 1 Johns. Ch. R. 413. Now this dictum asserts more than the surety is entitled to a cession of the collateral securities and to the rights of the creditor thereon—it declares the principle of the civil law, that he is to be considered as a purchaser from the creditor of the

debt. It therefore denies the position of Lord Eldon, that the payment by the surety is an extinguishment of the debt, and of course all the conclusions drawn from that position. * * *

We are the better satisfied with our judgment in this case, for the reason that the substitution does injustice to no one. The creditor, of course, has nothing to do with it—he is satisfied, and if the representatives of the principal, if he be dead, or if the principal debtor himself, being in life, can be presumed to be unaffected by the paramount equity of his sureties' claim, he and they must be presumed to be indifferent, whether it is allowed to him, or is reserved for creditors of a lower grade. Let the amount of the claim go either way, no injustice can be done to him. In any event, it goes in payment of his debts. If anybody is entitled to complain, it is the creditor who, holding a lower grade of claim, is excluded by the substitution of the surety. But, really, no injustice is done to him. The surety, by paying the debt to the creditor, abstracts from the assets of the principal debtor, just that amount which the creditor himself would have abstracted, if he had not paid it. The surety could compel the creditor indeed to go upon that fund before resorting to him. Story's Com., Vol. I, 592; 1 Vern 1, 89; 6 Vesey 734; 2 John. Ch. R. 561, 562. So the creditor, by claim of lower grade, is in no worse condition than he would be if the security had not paid the debt.

Our judgment, too, derives support from the obvious policy of all our own legislation, relative to the substitution of sureties. That policy is to place the surety in the place of the creditor. Witness the several acts of the legislature giving to sureties the control of executions against their principals, when paid by them. Counsel for the plaintiff in error have sought to draw from these acts the contrary inference. The right of substitution being given by express act of the legislature, the inference, say they, is, that in the judgment of the legislature, it did not before exist. But we think the legislation of Georgia upon this subject, is in affirmance of the right as it existed upon general equitable principles before, and is only intended to cumulate and simplify the remedy by which it is enforced.

Let the judgment of the court below be affirmed.

THEOPHELIA G. TOWNSEND, RESPONDENT, *v.* OLIVER B. WHITNEY, APPELLANT.

75 *N. Y.* 425 (1878).

EARL, J.: The defendant and Solomon A. Ferris were appointed by the surrogate of Ulster county administrators of the estate of John J. Ferris, deceased, and upon such appointment, they gave the bond required by law, signed by them and by William H. Townsend and another who is now dead, as sureties. Subsequently the administrators accounted before the surrogate, and he made a decree by which he ordered them to pay certain sums to Mrs. Love, Mrs. Ferris, and Mrs. Elting, respectively, as their distributive shares of the estate. These sums not having been paid, subsequently a certificate of the decree was obtained from the surrogate, and the decree was docketed in the clerk's office of Ulster county, under the provisions of chapter 460 of the Laws of 1837, as amended by chapter 104 of the Laws of 1844. The decree did not become merged by docketing the same. The docket did not make it a judgment, but simply made it a lien upon real estate for the amounts shown in the certificate; and executions could thereafter be issued to enforce the same, as upon judgments recovered in the county court. After the decree was thus docketed, the persons in whose favor it was docketed had two remedies to enforce payment of the money due them; one by attachment against the administrators in the surrogate's court and another by executions based upon the docket. The two remedies are not inconsistent, but concurrent or cumulative; and they may both be pursued until the decree has been complied with.

Executions were issued and returned unsatisfied, and then, upon application, the surrogate assigned the bond to the persons in whose favor the decree was made, for the purpose of prosecution by them. (65, Chap. 460 of the Laws of 1837.)

Mrs. Love, Mrs. Ferris, and Mrs. Elting then commenced actions upon the bond against the administrators and Townsend, the surviving surety, and recovered each a judgment for the amount due her. Then Townsend, the surety, with his own money, paid the amounts of the judgments to Mrs. Love, Ferris, and Elting, and procured them to assign the judgments and also the decree of the surrogate to the present respondent, his wife. This he did for the purpose of enabling her to proceed by attachment against the administrators to compel payment by them. She then applied to the surrogate for an attachment against the administrators for not paying the money as directed by the decree, and he denied the remedy on the ground that the payments of the judgment by the surety, in the manner above mentioned, discharged both the decree

and the judgments. But his decision was upon appeal reversed by the Supreme Court, and the administrator, Whitney, has appealed to this court.

The appellant now claims that the decree was merged in the judgments subsequently obtained upon the bond, and hence that an attachment to enforce it is unauthorized. This claim is not well founded. The decree was the principal debt, and the bond was a collateral security for such debt. The judgments were not recovered upon the decree, but upon the bond. It is too clear to need argument that a judgment upon a collateral security does not merge the principal debt, and does not suspend, so long as it remains unpaid, any remedy upon the principal debt. (Day v. Leal, 14 J. R. 405; Baker v. Martin, 3 Barb. 634; Supervisors of Livingston Co. v. White, 30 id. 72.) The parties entitled to payment under the decree had the right to pursue their remedies upon the decree and also upon the bond, until they obtained satisfaction.

It is also contended, on behalf of the appellant, that the payment of the judgments by Townsend, in the manner above mentioned, satisfied both the decree and the judgments. It is probably true that the case is not altered by the assignment to Mrs. Townsend. She had no separate estate and no means. Her husband furnished the money to pay the judgments, and the assignments to her were merely formal, to enable him, in her name, to enforce the decree. This case may therefore be treated as if the surety had paid the judgments, and then taken an assignment of them, and also of the decree, for the purpose of enforcing them against the principal debtors. (1 Story's Eq. Jur., § 499b.)

Where one of two joint debtors, both of whom are principals, pays a joint judgment, the judgment becomes extinguished, whatever may have been the intention of the parties to the transaction; and it is not in their power, by any arrangement between them, to keep the judgment on foot for the benefit of the party making the payment. (Harbeck v. Vanderbilt, 20 N. Y. 395.) The remedy of the party thus paying is by an action against his codebtor for contribution.

But a different rule prevails where one of the joint judgment debtors is a surety upon the obligation put into judgment. Under the civil law, a surety paying the joint obligation is entitled not only to be subrogated to all the securities which the creditor holds for the payment of the debt, but he is entitled to be substituted, as to the very debt itself, to the creditor, by way of cession or assignment. It treats the transaction between the surety and the creditor, according to the presumed intention of the parties, to be not so much a payment, as a sale of the debt. (1 Story's Eq. Jur., § 500; 1 Domat, bk. 3, tit. 1, § 6, art. 1.) But this broad rule of equity has not been fully adopted in England. There, it seems to be the general rule, that a payment of a joint obligation by a surety extinguishes the obligation both at law and in equity, and that it

can not be kept on foot for his benefit. But a surety thus paying is entitled to all the collateral securities held by the creditor for the payment of the debt. (Copis v. Middleton, 1 Turn. & Russ. 224; Reed v. Norris, 2 Milne & Craig 361; Hodgson v. Shaw, 3 Mylne & Keene 183.) It is there held that the surety can not be subrogated to the very obligation paid, because it does not survive payment, and there is nothing left to which he can be subrogated; and that he can be subrogated only as to such securities and remedies as survive the payment of the principal obligation. But it has not always been easy to define the cases in which subrogation could be had, and the English authorities are not all consistent. It would be useless to criticize and attempt to reconcile or distinguish them.

The general American doctrine in favor of sureties is more liberal than that of the English courts; and I will refer to only a few of the cases decided in this state. In Cuyler v. Ensworth (6 Paige 32), four persons became jointly liable in the official bond of a county treasurer, who afterward misapplied the funds of the county and died insolvent, and a judgment was thereupon recovered against the four sureties in the bond, jointly, and three of them afterward paid the whole amount of the debt and costs, and an execution was issued upon the judgment for their benefit, on which the sheriff was directed to levy one-fourth of the amount of the judgment of the property of their cosurety, which execution was subsequently returned unsatisfied; and it was held that the three sureties who had paid the whole debt and costs, could file a creditor's bill in their own names against their cosurety to obtain satisfaction of his ratable proportion of the judgment, out of his equitable interests and choses in action which could not be reached by the execution at law. The broad doctrine is laid down that "the surety, by the mere payment of the debt, and without any actual assignment from the creditor is, in equity, subrogated to all the rights and remedies of the creditor, for the recovery of his debt against the principal debtor or his property, or against the cosureties or their property, to the extent of what they are equitably bound to contribute." Although the judgment was paid, it was held that the sureties who paid it were subrogated to all the remedies which the creditor had to enforce payment; and yet under most of the English authorities, the judgment by such payment would have been held to be extinguished, so that there could have been no subrogation in reference thereto. In Speiglemyer v. Crawford (6 Paige 254) there was a creditor's bill prosecuted on behalf of a surety against the principal, founded upon a decree against the principal and surety for the payment of money; and the chancellor said: "If the surety had paid the decree, he would, in equity, have been entitled to an assignment of all the rights and remedies of the complainant to compel payment and satisfaction of the debt and costs by the principal debtor. He would also, in that case, have been permitted to file a

creditor's bill against the defendant in his own name, founded on such original decree, to obtain satisfaction out of her property which could not be reached by the execution on such decree."

If A executes to B a bond for the payment of money which is guaranteed by C, and at the same time executes a mortgage upon real estate to secure the payment of the same sum, and C is compelled to pay the bond, he is entitled to be subrogated to the mortgage and enforce it for his indemnity. (Mathews v. Aikin, 1 Comst. 595.) And yet the payment of the bond also pays the mortgage, and the mortgage in the hands of the mortgagee is absolutely as much extinguished as the bond. In equity however the mortgage is kept in life, just as it was before payment, for the benefit of the surety. In England, the surety, in such a case, is allowed to be subrogated to the mortgage, on the theory that the mortgagee's estate was not divested by payment and could only be divested by a reconveyance to the mortgagor, and hence that the estate survived payment, and was not extinguished thereby. (Copis v. Middleton, supra.) Here subrogation is not upon that theory, as the mortgagee takes no estate in the land, and the lien of the mortgage becomes extinguished by payment. But the subrogation is based upon the broad doctrine of equity, that the surety upon payment is entitled to all the remedies and securities which the creditor held before payment. In Lewis v. Palmer (28 N. Y. 271), Wright, J., laid down the rule thus broadly: "It is a well-settled principle, that a surety who pays a debt for his principal is entitled to be put in the place of the creditor, and to all the means which the creditor possessed to enforce payment against the principal debtor." In Clason v. Morris (10 J. R. 525), Spencer, J., said: "That a surety who pays a debt for his principal, has a right to be put in the place of the creditor, and to avail himself of every means the creditor had to enforce payment against the principal debtor, is a principle which I had supposed incontestable." In Goodyear v. Watson (14 Barb. 481), the rule of the civil law was adopted, and a very learned court held that where a surety paid a judgment recovered against himself and the principal debtor, and took an assignment thereof for his own benefit, such payment did not extinguish the judgment; but that after the death of the principal, payment of it, according to its priority of date out of the assets of the principal debtor, might be decreed by the surrogate; and a similar decision was made in the case of Alden v. Clark (11 How. Pr. 209).

These citations are sufficient to show what the rule is in this state; and I will now proceed to apply it to this case.

It is not necessary to hold, in this case, as many authorities in this country, as well as the civil law, would warrant, that the judgments paid by Townsend survived, so as to be the subject of subrogation. If the judgments were completely extinguished by the payment, it is because they were joint judgments against the prin-

cipals and the surety. But the creditors had two remedies; one upon the judgments, and another upon the decree which could be enforced by attachments; and these two may be treated as securities for the payment of the same debt. The surety was not a party to the decree, and that could not be enforced against him. The creditors had independent remedies upon the decree; and when the surety paid the judgments, he took the place of the creditors as to such decree, and was subrogated thereto. It matters not that payment of the judgments also paid the decree. Payment of a bond also discharges the mortgage collateral thereto, and yet, as shown above, the mortgage, for the purpose of subrogation, survives.

I am, therefore, of opinion that upon the payment made by the surety, he became subrogated to this decree, and he had the right to have the same assigned to himself or to some other person designated by him.

It is also said that the assignee, Mrs. Townsend, can not enforce this decree in her own name by attachment. This is a mere technical objection, and not one of substance. The surety could, if necessary, have used the names of the original creditors in the enforcement of the decree. Such is always the right of a surety in such cases, if his interests require it. But by this assignment the whole legal title to the decree was vested in the assignee. She is entitled to the moneys due thereon. The duty, which was before due from the administrators to the original creditors, is now due to her, to the same extent. She has become a party to the decree, and can invoke every remedy for its enforcement. Every sale of a judgment, decree, or other obligation carries with it every remedy which the law gives the seller to enforce payment. The remedy attaches to and inheres in the obligation, and does not pertain to the person of the owner.

Some objection is made to the regularity of the proceedings before the surrogate. It is sufficient to say that no such objection was made before the surrogate, and that by the order of the Supreme Court the proceeding is remitted to the surrogate; and if he did not before, he can, upon the further hearing of the matter, conform to the statute. It is therefore not necessary to examine this objection.

The order of the Supreme Court must be affirmed, with costs.

All concur.

Order affirmed.

Hill v. King, 48 Ohio St. 75, 26 N. E. 988; Cottrell's Appeal, 23 Pa. St. 294; Bankers' Surety Co. v. Linder, 156 Iowa 486, 137 N. W. 496.

A surety paying taxes for his principal is entitled to be subrogated to the state's right to be preferred in the distribution of the principal's assets. Orem v. Wrightson, 51 Md. 34, 34 Am. Rep. 286.

A surety may be subrogated to the right of a creditor to have a transfer of property made by the debtor set aside as being made fraudulently. Dudley v. Buckley, 68 W. Va. 630, 70 S. E. 376; Keel v. Larkin, 72 Ala. 493.

SECTION 5. SUBROGATION BETWEEN COSURETIES

SANDERS *v.* WEELBURG, EXECUTRIX

107 *Ind.* 266, 7 *N. E.* 573 (1886).

HOWK, C. J.: Appellant shows in his complaint, as we have seen, that he and the appellee were cosureties of one Frederick Weelburg, as principal debtor, in a certain judgment rendered against all of them, on January 29, 1879, in and by the superior court of Marion county; that on April 9, 1879, appellant paid the balance then due of such judgment, interest and costs, to wit, the sum of $1,811.50; that on the next day, April 10, 1879, an execution was issued on such judgment in favor of appellant, as such cosurety, and delivered to the sheriff of Marion county; that by virtue of such execution, such sheriff offered and sold to appellant certain property of the principal debtor, on April 26, 1879, for $378, and, on May 31, 1879, certain real estate and leasehold interests of such principal debtor, for $50, and on July 14, 1879, certain personal property of the principal in such judgment, for $28.29; and that on April 2, 1880, such execution was returned, no other property found of Frederick Weelburg, principal in such judgment, whereon to levy. On such several sales to appellant, his complaint shows that he paid the costs and credited the remainder of his several bids on the judgment.

After his several purchases of the property of Frederick Weelburg, principal in such judgment, and after he had credited the judgment with the net amounts of his several bids for such property, as stated in his complaint, appellant filed his claim herein to recover of the appellee, as his cosurety in such judgment, by way of contribution, the sum of $700 and interest thereon at the rate of eight per cent. per annum from and after March 13, 1879. It is claimed on behalf of the appellant, that he purchased the property of the principal in the judgment at public sales thereof by the sheriff of the county, where all parties, the appellee included, had the right to appear and bid therefor; that he had the lawful right to purchase such property, at such sales, and as no one would nor did bid more therefor than he, to purchase the same at and for the amounts of his several bids, without regard to the actual value thereof; and that, having so purchased such property, he can not be required to account therefor even to the appellee, as his cosurety, at its actual value, or at any greater value than the aggregate amount of his several bids.

On the other hand, it is claimed on behalf of appellee that, as she was the cosurety of appellant in such judgment, equity, good conscience, and fair dealing exacted of him the utmost good faith

in his transactions with her in relation to the judgment, and in connection with the property of the principal in such judgment; that as the judgment was a common burden to her and appellant, as such cosureties, so the property of the principal in the judgment became and was a common fund for the benefit and protection alike of each and both of them; that by suing out and delivering to the sheriff of the county an execution on such judgment, in appellant's favor, he acquired a security for the payment of the judgment, by the lien of the execution on the property of the principal therein, which security inured to the benefit and for the protection of the appellee, as his cosurety; that by appellant's acts in procuring forced sales of such property of the principal in the judgment, and in becoming the purchaser thereof at prices relatively nominal, the value of such security became and was largely depreciated, if not wholly lost; and that, by means of the premises, appellant became and was justly chargeable with the fair and reasonable value of such security to the appellee, as his cosurety, in the equitable adjustment of appellant's claim herein to contribution.

These conflicting claims of the parties respectively involve, as it seems to us, the entire merits of the controversy in this cause. If appellant is right in his claim or contention, as we have heretofore stated it, the general verdict for appellee is wrong, and the judgment thereon can not stand, but must be reversed, because the record before us clearly shows that the case was tried below upon a theory which antagonizes and is irreconcilable with appellant's claim or contention. If, on the other hand, appellee's claim or contention, as it is heretofore stated, is the correct one, as we think it is, the general verdict is right upon the evidence, and the judgment below must be affirmed. It is abundantly shown by the evidence in the record, that the fair and reasonable value of the property of the principal in the judgment, which was levied upon and sold by the sheriff upon the execution in favor of appellant, and of which he became the purchaser as aforesaid, largely exceeded in the aggregate the full amount due him on such judgment, of principal, interest, and costs.

Appellant, having fully paid and satisfied the judgment to the judgment creditor or plaintiff, by means of such payment, acquired at the time a cause of action against the appellee, as his cosurety in such judgment; but in his suit on such cause of action, it is clear, we think, that under our law he could not recover of the appellee any more than she was "equitably bound to pay." Prima facie, appellee as the cosurety of appellant was liable to him for the one-half of the sum paid by him to the judgment plaintiff, in satisfaction of such judgment; but this prima facie liability was subject to reduction by whatever sums could be realized from the property of the principal in such judgment. The property of the principal in the judgment was a common fund for the benefit and protection of both

the sureties alike, the appellee as well as the appellant. By his payment of the judgment to the judgment plaintiff, appellant became and was practically, at least, the owner thereof, and was fully authorized to sue out execution thereon for his own use, under the provisions of section 1214, R. S. 1881. The judgment was then a lien on the real estate and chattels real of the principal therein; and when, on the next day after his payment of such judgment, appellant sued out an execution thereon, in his own favor, and delivered the same to the sheriff of the county, he thereby acquired a valid lien on all the personal property of such principal. These liens upon the real and personal property of the principal in the judgment were a security which appellant had acquired and held as aforesaid; but such security innured in equity to the benefit and for the protection of the appellee, as the cosurety of the appellant in such judgment.

In Sheldon on Subrogation, section 143, the law on the subject under consideration is thus stated: "When one of two or more cosureties obtains in any manner a security for the payment of the debt, he does this for the benefit of all the sureties; he is a trustee for his cosureties as to such security, and is held for them to the duties which arise from that relation, and must do no act, or voluntarily omit to do any act, by which such security will be depreciated or lost, but must faithfully apply it to the payment of the debt; or he will be chargeable to his cosureties with the amount of the security, in the adjustment of their proportions of the debt." The language quoted and the doctrine declared are fully supported by the numerous authorities cited in the footnotes by the learned author. The court here discussed Hall v. Robinson, 8 Ired. 56; Owen v. McGehee, 61 Ala. 440; Schmidt v. Coulter, 6 Minn. 492; and Comegys v. State Bank, 6 Ind. 357.

Where one surety obtains a security, it inures at once to the benefit alike of himself and his cosurety. He can not deal with such security to his own advantage, and to the prejudice of his cosurety, without consulting the latter and without his assent. He occupies the position of a trustee for his cosurety, and can not deal with the fund to the prejudice of the latter, without his authority or consent. In such case, where the surety has it in his power, for his own advantage, to sacrifice the common fund which, in good conscience, he is bound to protect, the general doctrine is that he will not be permitted to avail himself of any such advantage to his own profit, and to the loss and detriment of his cosurety.

We do not decide, in this case, that appellant did not have the right to sue out execution on the judgment and procure the sale by the sheriff of the principal's property; for this right he clearly had. What we do decide is that if the appellant, at such sales, purchased the property of the principal, at comparatively nominal prices, and then sued his cosurety for contribution, she had the right, in bar of

such suit, to show, as she did, that such property, at its fair value, was more than sufficient to satisfy such judgment.

Our conclusion is that the court committed no available error in overruling appellant's motion for a new trial of this cause.

The judgment is affirmed, with costs.

LEGGETT *v.* McCLELLAND

39 *Ohio St.* 624 (1884).

Johnson, C. J.: The facts briefly stated are, that William Legget and Richard McClelland as cosureties of George P. Craig, on his bond as township treasurer, were compelled to pay some $300 each, to make good the default of their principal. Craig's wife had executed to McClelland an indemnity mortgage on her separate property, to save him harmless as a surety of her husband. This mortgage was for his sole and exclusive benefit. In order to do this, and as necessary to its legality, her husband joined in its execution. Subsequently to the payment by the cosureties, McClelland, in proceedings to foreclose, was reimbursed out of the proceeds of the sale of the wife's lands thus mortgaged. The administrator of William Leggett now sues to recover one-half the amount received from this indemnity. Both husband and wife are still living.

The common pleas decided that upon this state of fact, the plaintiff could not recover, and this judgment was on error to the district court affirmed.

It is now sought to reverse these judgments on the ground that this indemnity inures to the equal benefit of both sureties. This is resisted. It is claimed that the rule of equality of right to an indemnity fund applies only when it comes from the principal, and that as this mortgage was upon the separate property of the wife, and was given for the sole and exclusive benefit of defendant, it does not come within the general rule applicable where the indemnity is out of the estate of the principal.

Where a principal debtor indemnifies one or more sureties, his creditor may, in equity, be subrogated to the debtor's right to the same to justify his claim after exhausting his legal remedies, so on the same principles of justice or natural equity, all the cosureties are entitled to share equally in such indemnity. Each has an equal equity in the fund provided by the principal. This right to subrogation by the creditor, or contribution by cosureties is not founded on contract, but grows out of the natural equity of the case. The property of the principal is bound for his debts. His obligation to his sureties are equal, therefore indemnity to one, coming from him, is indemnity for all. Oldham v. Broom, 28 Ohio St. 41; Dering v.

Winchelsea, 1 Lead. Cas. in Eq. (103) and notes; Brandt on Suretyship, 223; Gaster v. Waggoner, 26 Ohio St. 450.

This rule of equality is subject to be varied by agreement among the parties.

In Dering v. Earl of Winchelsea, 1 Lead. Cas. in Eq. (103), Lord Ch. Baron Eyre says: "That contribution is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it."

See notes to above case, p. 171, 4th edition.

An instance of such qualification is found in Moore v. Moore, 4 Hawkes (N. C.), 15 Am. Dec. 523, where one cosurety, in consideration of his becoming such, stipulated for and received, with the consent of his cosureties, separate indemnity from the principal. It was held that the cosureties could only share in the surplus after such surety had been fully indemnified. Such indemnity was not in fraud of the rights of cosureties.

The general rule, however, is as stated, and the reason on which it rests is, that one who takes indemnity from the principal is, in equity, a trustee for all who are equally bound.

As the taking of such indemnity from the principal lessens his liability to pay, it would be a fraud on his cosureties to allow him to convert it to his sole use in the absence of their consent. As trustee for his cosureties, he is bound to such discreet and reasonable use of the securities as would be required from a trustee. Carpenter v. Kelley, 9 Ohio 106.

So if the debtor give his surety indemnity the creditor may avail himself of it by subrogation, though in the first instance it was unknown to him. Hopewell v. Bank, 10 Leigh 206, 221; McCullom v. Hinckley, 9 Vt. 143.

The creditor's right of subrogation rests upon the same principle of natural equity as that of cosureties to share in the indemnity. The property of the principal belongs to the creditor, and he, after exhausting his remedy at law, may subject it in the hands of the surety to the satisfaction of his debt. The holder of such indemnity is a trustee for the creditor. So also is he a trustee for his cosureties.

This indemnity was not furnished by the principal. It was the separate estate of his wife and not liable for his debts. The wife, for reasons satisfactory to herself, mortgaged her separate property for the sole and exclusive benefit of defendant. It was no fraud upon the creditor or the cosurety to indemnify one surety. As it was not the property of the principal, no trust arose, either in favor of the creditor or of the cosureties, in the absence of any showing that the bond was accepted, or that the cosureties signed on the faith of such indemnity.

The indemnity was to save McClelland harmless as surety. He

has been fully reimbursed out of the wife's separate estate, thus fulfilling the terms of the wife's contract.

To compel him now to contribute one-half of this fund to the co-surety, would violate the contract she made. As she was under no obligation to pay the debt, and as her husband had no interest in the property liable to be taken to satisfy the claim, neither the creditor nor the cosureties had any right, in equity, to treat defendant as trustee for them.

It is claimed however, that it was a joint mortgage of husband and wife, and conveyed his contingent estate by the curtesy, and to that extent, at least, was an indemnity by the principal.

It is enough to say, that under the existing statutes, the separate property of the wife belongs to her, and with all its issues, rents and profits, is under her sole control, that the husband, during coverture, has no estate or interest in the same liable at law or in equity for his debts or to his incumbrance, and the only estate of curtesy left to him is as surviving husband in the real estate of which she died the owner.

As this land has been sold, during coverture, his curtesy expectant, if there be such a contingent estate, is gone, and at her death no right, to curtesy would survive to her husband.

The statute relating to the acknowledgment of deeds and other instrument, required he should join with his wife in the execution of this mortgage. It was a legal necessity that he should do so to make it a valid mortgage, but in so doing he furnished no part of the indemnity. The fund therefore did not arise even in part from the principal, and hence the general rule that when a principal indemnifies one surety it inures to the benefit of his cosureties, does not apply.

Judgment affirmed.

In the case of Assets Realization Co. v. American Bonding Co., 88 Ohio St. 216, 102 N. E. 719, Ann. Cas. 1915A, 1194n (1913), the court says: "Where several surety companies are bound by separate instruments on account of the same principal, and each company, by its bond, limits its liability, in the event of default on the part of the principal, to such proportion of the total loss sustained by the obligee as the penalty named in its bond bears to the total amount of the bonds furnished by the principal to the obligee, the suretyship of each company is a separate and distinct transaction and the relation of cosuretyship among them does not arise, nor does the right of contribution exist.

"Where, in such case, collateral or securities are placed by the principal in the hands of one of the companies to indemnify it against any loss it might incur by reason of its obligation on its bond, none of the other companies, in the event of the default of the principal, is entitled to any part of such collateral or securities to indemnify it against a loss incurred on account of its bond."

SECTION 6. SUBROGATION BETWEEN SUCCESSIVE SURETIES

BRANDENBURG v. FLYNN'S ADMINISTRATOR

51 *Ky.* 397 (1851).

JUDGE MARSHALL delivered the opinion of the court.

An execution in favor of David Brandenburg against O. Tracy having been replevied by Tracy, with Hulse and Joseph Brandenburg as his sureties, was afterward enjoined by Tracy on a bill in equity, in which he made his two replevin sureties defendants. M. Flynn was the surety in the injunction bond. The injunction was dissolved with damages, and Tracy in the meantime having become insolvent and conveyed his property to be applied to payment of his debts, M. Flynn or his administrator was compelled to pay the judgment on the injunction bond, including the amount due on the replevy bond with costs and damages. The present bill, filed by Flynn's administrator, seeks to make the sureties in the replevy bond, of whom Joseph Brandenburg alone is now solvent, reimburse him, or contribute to his reimbursement, for the payment thus made. The bill also alleges that the executors of David Brandenburg, the original creditor, had received more than $100 under a decree distributing the proceeds of Tracy's property conveyed as above mentioned, and that said sum should go, or should have gone, to the credit of the debt on the replevy bond; and he prays a decree for the amount against said executors who are made parties. It appears, however, that within two months after the bill was filed, and before the executors were served with process the sum referred to which had not actually come to the hands of the executors, but had been received by another for them, was paid to the complainant and it does not appear that it ever was refused.

Before the injunction was obtained by Tracy an execution on the replevy bond had been levied on his land and other property, the sale of which was directed by the creditor to be postponed until further orders, and in two months afterward, and before a sale was made, the execution was stayed by the injunction. It was agreed as a fact in this case, that at the date of the injunction Tracy's property was sufficient to pay the debt.

On the hearing, the court decreed that Joseph Brandenburg should pay to the complainant $74 with interest, and the costs of the suit, and there was no decree against Hulse. To reverse this decree, Joseph Brandenburg prosecutes a writ of error, claiming that the bill should have been dismissed as to him, and the complainant by cross-error complains that the decree is erroneous in not fully reimbursing his payment of the replevy bond, etc., and

also in not decreeing costs against the executors of David Brandenburg.

The complainant's claim seems to be based upon a wrong application or improper extension of the principle that when a surety pays the debt he is entitled to the benefit of such securities for it as the creditor held, or else upon the principle that the surety in the injunction bond was substantially but a cosurety with the sureties in the replevin bond which was enjoined and entitled to contribution from them, or upon the idea that the injunction surety was the surety not only of principal but also of the sureties in the replevy bond. The decree was probably founded upon the idea that, all being substantially sureties for the same debt, all should be regarded as cosureties, and therefore that any one who, by the insolvency of the principal, has been compelled to pay, may require the others, or such as are solvent, to contribute so as to equalize the loss.

It is not even alleged that Flynn became bound in the injunction bond at the request of either of the sureties in the replevy bond, or that the injunction was obtained at their instance or with their assent. And it is certain that it operated to their injury by prolonging their responsibility, and subjecting them to hazard from which they would otherwise have been relieved by the sale of the property of their principal, then under levy for the purpose. There is no pretense for saying that Flynn was surety for them. And although he made himself conditionally responsible for the same debt for which they were bound, yet as his obligation is conditional, while theirs is direct, as his obligation is more extensive than theirs, as it was entered into not only after the date of theirs but obviously in aid of the principal alone, for a purpose in which they did not concur, and with the probable effect of injury to them, he can not, as we think, be regarded in any just sense as a cosurety with them. It is for the purpose of doing equity that the chancellor regards all persons who are bound, though by different instruments executed at different times, for the same debt or duty of the same individuals, as cosureties bound to contribute to any loss which either may sustain. The facts of this case prove that the application of the principle here would be inequitable. But the particular facts of this case are not necessary to take it out of a rule which might otherwise embrace it. We know of no case in which, on the ground either of contribution among cosureties or of substitution to the securities of the creditor, a subsequent surety coming in aid of the debtor alone, without the request or concurrence of the original sureties, and in the regular course of the remedy for coercing the debt from him alone, or for the purpose of obstructing its collection by his own separate proceeding and for his own benefit, has ob-

tained in equity either partial or full reimbursement from the prior sureties.

On the contrary, the doctrine established by the adjudged cases, and as we think in conformity with the true principles of equity, is that, if under such circumstances the prior surety is compelled to pay the debts, he thereby becomes entitled by substitution to the rights of the creditor against the subsequent surety to the whole extent of the payment made and of the obligation of the subsequent surety; which precludes all right on the part of the subsequent surety, should the debts be coerced from him, to claim reimbursement from the prior surety. The cases of Parsons v. Briddock (2 Vernon 603); Patterson v. Pope (5 Dana 244); Kouns v. Bank of Kentucky (2 B. Monroe 305); Bohannon v. Combs (12 B. Monroe), and other cases, establish or recognize the doctrine above stated, and sufficiently illustrate the principles on which it rests, and its applicability to the present case. We content ourselves, therefore, with the conclusion that on principle and on the authority of the cases referred to, the complainant was entitled to nothing against either of the sureties in the replevy bond, but the bill as to them should have been dismissed. And, as there appears to have been no necessity for bringing the executors of David Brandenburg before the court for the purpose of compelling payment of the sum received from the assets of Tracy on account of this debt, and which the complainant received before service of process, the cross-errors assigned by Flynn's administrator are wholly unavailable.

Wherefore, on the writ of error of Joseph Brandenburg, the decree is reversed, and the cause remanded, with directions to dismiss the bill with costs.

DENT *v.* WAIT'S ADMR.

9 *W. Va.* 41 (1876).

Edminston, J.: This is an appeal from a decree of the circuit court of Wood county. George Dent filed his bill against one Robert Crichton, S. S. Cook, administrator of Walton Wait, deceased, and the Second National Bank of Parkersburg. In his bill he alleges that the Second National Bank of Parkersburg, at the spring term, 1872, of the circuit court of Wood county, obtained a judgment against Crichton and Wait for the sum of \$256.70, with interest thereon from the 6th day of September, 1871, till paid, and \$17.15 costs, and files an abstract of said judgment as part of his bill. This abstract simply shows that a judgment in favor of the bank was rendered against Crichton and Wait for the sum alleged in the bill. The bill then alleges that Wait departed this life during the said term of court at which said judgment was rendered;

that execution on said judgment was sued out against Crichton which went into the hands of the sheriff and was levied upon the property of Crichton, and that Crichton gave a forthcoming undertaking with the complainant Dent as his security, by which they bound themselves to pay the sum of $350, in the event that said Crichton failed to deliver to the sheriff the property levied upon, on the day of sale; that the property was not delivered, and that such proceedings were had that a judgment was rendered on said forfeited undertaking for the sum of $350, the penalty, but to be discharged by the payment of $299.50, with interest thereon from the date of the bond and costs. He then charges that execution issued on this judgment and he was compelled to pay and discharge the same, said Crichton having become insolvent. It is then alleged that it will appear by the abstract of said judgment filed that said judgment was the joint debt of said Crichton and Wait; that the plaintiff by signing said undertaking became security for the original debt; and that by reason of his having paid off and discharged said execution to the said bank, he is entitled to be substituted to all the rights of said bank against the said Crichton and the estate of said Wait, subsisting at the time he became bound for the payment of said debt; and that he is entitled to a decree against Crichton and the estate of Wait for the amount of the said original judgment with interest and costs.

Cook, the administrator of Wait, files his answer and claims that the debt on which said judgment was founded was not the joint debt of Crichton and Wait, and shows by filing the original note on which the judgment was founded, that it was a negotiable promissory note executed by Crichton to Wait for an amount alleged to be due from Crichton to Wait; that Wait indorsed said note to the bank and drew the value thereof from the bank; that the note being dishonored was protested for nonpayment, and, under the act of assembly, a joint judgment was obtained thereon, and this is the judgment exhibited in the plaintiff's bill.

I might remark here that the allegations in the bill that it was the joint debt of the said Crichton and Wait, is, to say the least, under the circumstances disclosed in the cause, rather too general. It should have shown more clearly the nature of the obligation on which the judgment was founded and the true relation that the parties thereto sustained to each other, that the court could have seen more satisfactorily what the obligations of the parties were, and what the right of the plaintiff would be under the facts and circumstances of the case. But the pleader left the true facts to be developed by the defendant. This the defendant has done, as above stated, by filing the original note, protest and declaration, as an exhibit with his answer.

The cause came on to be heard upon the bill taken for confessed as to Crichton and the bank, answer of Cook, administrator, rep-

lication thereto, and the exhibits filed in the cause. The note, protest and declaration, filed as an exhibit with the answer, agree in amount, date and every particular, with the amount, date, etc., contained in the judgment filed as an exhibit with the bill and it is clearly the same debt; but as these papers are not properly proved or authenticated, it is claimed here that this court can not look to them as evidence in explanation of the case. We think, however, that as no objection was taken to them in the circuit court, where the supposed defect could have been remedied, it comes too late here for the first time. But if this be not so, and the facts stated by the defendant be excluded, the plaintiff, under his defective bill, would have no case on which the court could decree in his favor.

The circuit court on this state of facts gave the plaintiff below a decree against the estate of Wait for the sum prayed for.

The question presented to this court for review, is this decree right? There is no doctrine better settled in this state, ~~than that~~ where a security pays a judgment for another, he is entitled to be substituted to all the rights and remedies of the creditor ~~against~~ the principal debtor, subsisting at the time be became so bound for the debt. Robinson v. Sherman, 2 Gratt. 178; Preston v. Preston, 4 Gratt. 88; Hill v. Manser, 11 Gratt. 522, and numerous other cases might be referred to. This doctrine is founded upon no statute, nor does it grow out of any contract, but it is simply the custom of a court of equity, founded upon principles of equity and justice, and such as are necessary to be enforced, so that full and complete justice shall be done, as to the rights of all parties in interest. One of the fundamental principles governing the courts in enforcing this doctrine, which will be found to pervade all the cases on the subject, is that the court will not violate any legal right, by increasing the legal liability of any one of the parties in interest, in enforcing its decrees. It will respect and be governed by the legal rights existing between parties and even respect and enforce the superior equities existing. As, for instance, if there be a security for the debt, and the principal debtor does an act by which he introduces a second security, in such a way as it would operate to the relief of the first security, and the responsibility falls upon the second security, it will not revive the liability of the first security in favor of the second, but it will give to the second security all the rights and remedies of the creditor, as against the principal debtor, though it will not, as to the first security. This doctrine is fully established and illustrated in the case of Preston v. Preston, ante.

In that case Wm. P. Floyd as principal, with John B. Floyd, John Preston and Thomas L. Preston, his securities, executed a bond to James Rea for $1,000. In 1841 Rea obtained a judgment against Wm. P. Floyd, principal, John B. Floyd and John Preston. In 1842 he recovered a judgment against Thomas L. Preston, the other security. On the first judgment an execution issued and the

property of John B. Floyd, a security, was levied upon. John B. Floyd gave a forthcoming bond with Thomas L. Preston as security and judgment was rendered thereon. The principal debtor, Wm. P. Floyd, and John B. Floyd, had now become insolvent. T. L. Preston was compelled to pay the debt. On his bill to compel John Preston to contribute one moiety of the debt as a cosecurity, it was held that the rule was that all securities should contribute equally, but if one became insolvent his share should be apportioned among the solvent securities; but that in that case it appeared that the execution had been levied upon the property of John B. Floyd and his proportion of the debt would have been made out of his property, but for the execution of a forthcoming bond in which T. L. Preston joined as security, whereby John B. Floyd's property was released. Justice therefore required that the loss of the share of John B. Floyd should fall on T. L. Preston and not any part of it on John Preston. And the decree of the court was, that under the circumstances, the security John Preston should only contribute one-third of the debt; that T. L. Preston should be charged with his equal third as well as with that of John B. Floyd's third. The same equitable principles are clearly enunciated in the case of Langford's Exr. v. Perrin, 5 Leigh. 552. These cases, with many others, treat more particularly of the doctrine of contribution, but it is in reality the same doctrine and upon the solution thereof often depends the redress to be had in the disposition of the case, when the application of the doctrine of substitution is to be made.

The case of Douglass v. Fagg, 8 Leigh 588, is a leading case on the doctrine of substitution. Judge Parker, in his opinion, says, at page 598, "that all those who are bound for a debt for others, or with others, by whom they ought to be discharged, either wholly or in part, have a right, upon paying, to demand a cession of the actions of the creditor against the other debtors. * * * The doctrine of subrogation, it must be remembered, is the offspring of natural justice, and is not founded in contract. It is the creature of equity, and is so administered as to attain real, essential justice, without regard to form. He who, in administering it, would stick in the letter, forgets the end of its creation, and perverts the spirit which gave it birth." It was attempted, says Judge Parker, to charge Draffin because some of the books lay down the broad proposition "that a surety paying may require the creditor to subrogate him to all his rights, actions and hypothecations against all persons liable for the debt." But the courts, in applying the doctrine, have taken care to make it subserve the end of justice. Thus they always inquire who is the principal debtor, and if any one comes into his room, as to the creditor, they absolve previous sureties; holding that the supplemental surety comes also into the room of the principal debtor, as to these previous sureties.

Authorities to an indefinite extent might be multiplied to the

same effect, but it is deemed useless, as they are familiar to all; and the doctrine is common to all courts both in England and the United States.

In the case before us the doctrine of subrogation is attempted to be applied and enforced, and the question for our consideration is, was it properly applied under the facts in the case? The plaintiff seemed to rely upon the broad proposition "that he was a security and had paid the debt" and therefore he had the right to be substituted to all the rights of the creditor against all persons liable for the debt. The decree is based upon this broad proposition. What were the facts? Crichton being indebted to Wait, for property purchased of him, executed to him a negotiable promissory note for the amount of that debt, and Wait raised the money thereon by indorsing it to the bank. Who was the principal debtor? One answer alone can be given and that is that Crichton was the debtor. Wait was the payee, the money was due to him until he indorsed it over. This did not make him a principal debtor, his liability upon his indorsement was contingent until the note was protested and notice given to him thereof. Then he became liable to the bank with Crichton for it, and a joint action could be maintained against them by the bank. This was done and thus the judgment claimed in the bill was obtained. But it can not be claimed that because this action could be maintained against maker and indorser, that it changed their relations to each other. Crichton was still the principal debtor, Wait was the payee and indorser. If Wait had paid this note at or before protest, or after he could have sued Crichton as maker; if he had paid the judgment, he could have recovered the amount from Crichton. So it is clear the relation that existed between them when the note was executed was never changed.

Now when the execution issued against Crichton, the real debtor, and was levied upon his property, if the property had been sold, the debt would have been paid by the right party and Wait's liability would have ended. But by the act of Dent the property of Crichton is relieved from sale, the debt is not paid, until Dent pays it under the execution awarded on the forthcoming bond. Now under many decisions of the Court of Appeals of Virginia, the judgment at law is satisfied upon the execution and forfeiture of a forthcoming bond and Wait was entirely relieved from liability to the creditor while the bond remained in force. See Garland v. Lynch, 1 Rob. 545, and many cases therein referred to.

Upon the satisfaction made by Dent he was the security of Crichton, not Wait. He relieved Wait at law and being relieved at law his liability will not be revived in equity under the equitable doctrine of subrogation.

In Perrins v. Ragland, 5 Leigh. 552, Carr, Judge, in speaking of the second security, says: "Another friend of the debtor comes and says, 'I will be surety for the property, let the debtor have it.'

The first surety tells him, 'if he does this it is at his hazard. I am now clear and will keep so.' Should the second surety be allowed to say, 'I have paid this execution, you were once bound for it and must therefore contribute.' Surely not."

In the same case Judge Tucker says, "By the levy of the execution upon the property of the principal debtor, the sureties in the original bond were relieved of their responsibility."

In the quotation above, from Parker, Judge, in Douglass v. Fagg, he says expressly: "That the courts in applying the equitable doctrine of subrogation take care to make it subserve the ends of justice. Thus they always inquire who is the principal debtor, and if any one comes into his room as to the creditor, they absolve previous sureties, holding that the supplemental surety comes also into the room of the principal debtor, as to these previous sureties."

It was claimed that Wait was not a surety, that he was a joint debtor and therefore he was responsible to Dent. I have shown that he was not the principal debtor; and that is what a court of equity looks to in granting relief in the administration of the equitable doctrine of substitution—that the act of assembly giving a joint action against the maker and indorser of protested paper does not change their original relation to each other.

Now I do not deem it material to consider what is the legal relation existing between the maker and indorser of such paper; whether it is that of principal and security or not. I am inclined to the opinion that it is not; but that question is not in this case and no opinion is expressed as to it.

I am therefore of the opinion that the decree in this cause is erroneous and that the same be reversed and annulled, with costs to the appellant.

And this court proceeding now to enter such decree as the circuit court should have entered it is adjudged and ordered that the bill be dismissed and the plaintiff do pay to the defendant, S. S. Cook, his costs by him expended in the circuit court.

The other judges concurred.

Decree reversed and bill dismissed.

JOHN W. HARTWELL *v.* OLIVER SMITH

15 *Ohio St.* 200 (1864).

The Farmers' and Millers' Bank of Milwaukee sued A. Mitchell Hall, in the superior court of Cincinnati, and caused an order of attachment to be issued against his property, on the ground that he was a nonresident of the state. Hall resided in Kentucky, but carried on a partnership business in Cincinnati, in connection with Smith, the defendant in error.

Before the levy of the attachment upon any property, Hall obtained a discharge of the same, by executing with Smith, as his surety, an undertaking, under section 212 of the Code, to the plaintiff in attachment, in the presence of the sheriff (it being vacation of the court) conditioned that Hall should perform the judgment of the court. In due course of procedure, judgment was rendered against Hall. He desired to have the case heard on error before the general term of the superior court. To accomplish this, and obtain stay of execution, he applied to Smith to become his surety on the error bond. Smith agreed to this, and they together proceeded to the courthouse, to the clerk of the court, and Smith executed the error bond prepared for him by the clerk.

All this Smith did, under the impression that he alone would be surety on this error bond; but after he had signed it, the clerk informed them that there must be an additional surety. Hall and Smith then separated with the understanding that Hall would get another surety. Hartwell, the plaintiff in error, subsequently signed the bond as that surety, at the request of Hall.

The court, in general term, affirmed the judgment against Hall, who in the meantime had died, and the bank recovered judgment on the error bond against Smith and Hartwell and collected it from Smith. He brought an action against Hartwell for contribution, and recovered judgment for a moiety of what he had paid. To reverse this latter judgment Hartwell filed the present petition in error, in this court.

Scott, J.: There are two distinct and firmly-established rights of sureties, which are involved in the consideration of this case. First, that of substitution or subrogation, through which a surety paying off the debt of his principal is entitled to stand in the place of the creditor, and have all the rights which he has, for the purpose of reimbursement. A statement of this right was made in clear and forcible terms by the chancellor (Lord Brougham), in Hodgson v. Shaw, 3 My. & K. 183, where it was said: "It is hardly possible to put this right of substitution too high, and the right results more from equity than from contract or quasi contract; unless in so far as the known equity may be supposed to be imported into any transaction, and so raise a contract by implication."

The doctrine of the court in this respect was luminously expounded in the argument of Sir Samuel Romilly, in Craythorne v. Swinburne (14 Vesey 160); and Lord Eldon in giving judgment in that case sanctioned the exposition by his full approval. "'A surety,' to use the language of Sir S. Romilly's reply, 'will be entitled to every remedy which the creditor has, against the principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities

transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor.'"

The other right to which we have referred, is that of contribution, which arises in the case of cosureties, and which each may claim as against the others who are bound with him in a common liability. Whenever several sureties stand in the relation to each other of cosureties, by being bound for the same person, and for the same debt or engagement, so that they have a common interest, or a common burden to bear, if one of them be compelled to bear the whole or a part of the burden alone, he may call upon his cosureties to equalize the burden by contribution. This is a right arising also from equity, rather than from contract (except in so far as its universal recognition may make it an implied stipulation), and rests upon this ground, that where the parties stand in equali jure, equity which delights in equality, will require that the discharge from the common obligation which inures to the equal benefit of all, shall be obtained at their equal expense. Qui sentit commodum, sentire debet et onus. Craythorne v. Swinburne, 14 Vesey 160; Deering v. Winchelsea, 2 Bos. & P. 270.

In the case before us, two bonds, or undertakings, were executed by the debtor, with a surety or sureties in each. First, the undertaking for the discharge of the attachment, in which Smith, the plaintiff below, was the sole surety; and this was conditioned for the debtor's performance of the judgment to be rendered by the court in the action then pending. Judgment was subsequently rendered against the debtor, and the liability of the surety, Smith, thereby became fixed, unless that judgment could be set aside or reversed. With a view to its reversal, the debtor filed a petition in error in the proper court; and in order to stay execution, entered into a supersedeas bond or undertaking, conditioned for his payment of the condemnation money and costs, in case the judgment should be affirmed upon error. This latter bond was executed by both the parties in the present controversy, as sureties. And the surety, Smith, having been compelled, by the means of a suit upon the second bond, to satisfy the creditor, now seeks to enforce against Hartwell, as a cosurety, his supposed obligation to make contribution. Hartwell resists this claim on the ground that as between the two bonds, the sureties in the latter have a right, in case payment is enforced from them, to assert, on the principle of subrogation, all the rights of the creditor against the surety in the first bond. And as Smith himself is such sole surety, and therefore, ultimately liable to indemnify Hartwell, equity will not require the latter to make contribution.

In regard to this question of superiority of equities, which is liable to arise in the case of prior and subsequent bonds, executed by different sureties, for distinct purposes, and both constituting securities in the hands of the creditor for the same debt, it is well

settled that if the interposition of the second surety, is for the benefit of the principal alone, without the sanction or assent of the first surety, who may be prejudiced thereby; as when the effect of the second bond is to prevent the enforcement of present payment from the principal, and thus to prolong the responsibility of the first surety; in such a case the equity of the first surety is superior, and he is entitled to be subrogated to the rights of the creditor as against the second. Parsons & Cole v. Briddock, 2 Vern. 608; Pott v. Nathans, 1 Watts & S. 155; Burns v. Huntington Bank, 1 Penn. R. 395; Brandenburg v. Flynn's Admr., 12 B. Mon. 397; Dunlap v. Foster, 7 Ala. R. 734 (N. S.).

And this doctrine seems to be entirely equitable, for it is but reasonable that the benefit intended for the principal alone, by the second surety, should be conferred, if at all, at his own risk, and not at the risk or to the prejudice of other parties whose wishes were not consulted in the transaction.

But the rule is otherwise, where the surety in the second bond becomes bound for a purpose in which both the principal and the prior surety concurs, in which they both have an interest and where the assent of the prior surety is expressly given, or is clearly to be inferred from the circumstances of the case. In such a case the last surety has a right to look for his indemnity, not only to his principal, but to such fixed securities as had been given to the creditor, when his engagement was entered into, and on the faith of which he may be presumed to have incurred his obligation. Howe v. Frazier, 2 Robinson La. 424, and authorities cited supra.

It is settled law that if a creditor, by valid contract with his principal debtor, without the consent of the surety, extend the time of payment, by thus tying up his own hands, and suspending his right of action, on the original contract, against the principal, he discharges the surety. But if the contract for extending the time be made with the assent of the surety, his liability remains unaffected. Upon a principle quite analogous to this, do the conflicting equities of prior and subsequent sureties, in cases like the present, depend. If, without the consent of the first surety, the creditor is arrested in the collection of his debt from the principal, by the interposition of a second surety, the former will be allowed, for his indemnity, to be subrogated to the rights of the creditor against the latter. But this equitable right can have no place, where the first surety assents to the second contract of suretyship; and especially where it is entered into at his instance, or for his benefit. His unqualified assent and concurrence leaves his prior liability in full force, as between the two sureties, and entitles the latter to the full right of substitution as against him.

Applying this rule to the facts of the present case, as clearly shown by the testimony of Smith himself, the court below erred in rendering judgment in his favor. By the execution of the first

bond, Smith procured for his principal the discharge of the order of attachment. The creditor was thus prevented from securing his claim by a levy upon his debtor's property; the bond of Smith being substituted for such security. By the subsequent judgment against the debtor this security became fixed. It was for the interest of Smith, as well as for that of his principal that this judgment should be reversed. A petition in error was accordingly filed by the judgment debtor, and Smith united with him in executing an undertaking in order to stay execution. This undertaking the clerk declined to accept, without further security. The debtor thereupon proposed to secure an additional security, and to this Smith, readily, and unconditionally, assented; not for the purpose of dividing his responsibility, but because the desired stay of execution could not otherwise be obtained. Hartwell, who had no interest in the matter, and was hitherto a stranger to the whole transaction, was accordingly procured as additional security. Under this state of facts, I think it might properly be said that Hartwell became a surety at the request of Smith as well as of the debtor; and that, in respect to him, they were both principals, and he surety. Hunt v. Chambliss, 7 Sm. & M. 532; Cowan v. Duncan, Meigs R. (Tenn.) 470.

But it is enough to say that the supersedeas bond was executed with the express consent of the prior surety, unmistakably evidenced by his being a party to it; and that he can not therefore claim for it the effect of modifying his liability which had been previously fixed. We think it clear that had the debt been collected by the creditor from Hartwell, he should be subrogated to the creditor's rights under the attachment bond, and that Smith can not therefore call upon him for contribution.

It is claimed in argument that the attachment bond in this case is invalid, because taken by the sheriff before a levy upon property, and therefore unauthorized. But a reference to sections 212 and 213 of the code will show that this point can not be maintained. Those sections provide a mode for the discharge, not merely of property actually levied upon, but of the attachment itself; and this may be effected, at any time, before judgment, by a proper undertaking which, in vacation, and while the order of attachment remains unreturned in the hands of the sheriff, may be executed in the presence of that officer.

Judgment reversed, and cause remanded.

Brinkerhoff, C. J., and White and Welch, JJ., concurred.

SECTION 7. CONVENTIONAL SUBROGATION

MARY H. SHREVE *v.* JOHN B. HANKINSON ET AL

34 *N. J. Eq.* 76 (1881).

The Chancellor: The only litigation in this case is that which arises out of the cross-bill filed by Risdon Hankinson to establish his claim to the security of the complainant's mortgage to the amount of $2,500 and interest, after the complainant's claim under the mortgage shall have been paid. The mortgage was originally for $13,700 and interest. It was given by John B. Hankinson and wife to John Fairbairn, March 25, 1870, and was payable in four years. At Fairbairn's death it came into the hands of Joseph Becher, his executor. There were then due upon it $11,500 of principal, besides interest. August 5, 1876, there were paid to Becher $1,000 on account of the principal, and on the 24th of April following, $1,500 on the same account. The money for those payments was furnished by Risdon Hankinson, the complainant in the cross-bill, brother of the mortgagor, John B. Hankinson, at the request of the latter, and on an agreement between them (and they insist Becher so agreed also), that the former should have an interest in the mortgage to the amount of those advances, and interest for his security. On June 11, 1877, Becher assigned the mortgage to Annie H. and Fannie S. Fairbairn, and they, March 25, 1878, assigned it to the complainant. Risdon Hankinson's claim to subrogation is contested by Abraham Vanderbeck only. He is the holder of a subsequent mortgage given to him by John B. Hankinson on the premises. It was subsequently canceled of record, but Vanderbeck, in another suit in this court, seeks to set aside the cancellation. Both the payments made with the money advanced by Risdon Hankinson were made after Vanderbeck's mortgage was given, which was November 8, 1878. That they were made by John B. Hankinson with money borrowed from his brother Risdon for the purpose, and lent by the latter to him on the agreement that the lender should have the benefit of the mortgage for his security for the repayment thereof, with interest, there is no room for doubt. And it seems quite clear, also, that Becher, to whom the payments were made, was a party to the agreement. Not only do both the Hankinsons swear to it, but the testimony of Mr. Barrows (a counsellor at law) to the same effect, is positive and explicit. He testifies that, in the summer of 1876, John B. Hankinson called on and requested him to find somebody who would advance the money for the mortgage, on which there were then due of principal, $12,000; that John B. and Risdon Hankinson con-

sulted him with reference to the feasibility of securing the latter for the amount of an advance of $2,500 to be paid on the mortgage, which Risdon was willing to make, provided he could be secured by means of the mortgage. Mr. Barrows, both before and after advising with more experienced counsel on the subject, advised them that Risdon could be secured by the mortgage for the sums he should advance for the payment on account of the principal thereof, and which should be so paid, provided the money should be advanced on that condition and John's promise that it should be so secured. John borrowed the money under such promise, and paid it over to Becher on account of the principal of the mortgage. Mr. Barrows further testified as follows:

"On the 24th of April following (1871)—it may possibly have been the 23d, but my impression is that it was the 24th—Joseph Becher, executor of Fairbairn, John B. Hankinson and Risdon Hankinson, met at my office; Risdon Hankinson was then prepared to advance the further sum of $1,500 to Becher, on the Fairbairn mortgage; in the presence of all three above named I stated how Risdon expected to be secured for the sum he was about to advance, that he was to have an interest in the Fairbairn mortgage to that extent by the promise and express agreement of John B. Hankinson and of Becher, the executor; I asked John B. Hankinson and Becher if they had both proposed and agreed to that effect with Risdon Hankinson; they each replied they did; Mr. Becher then explained to me that he had already received $1,000, in August preceding, on the same agreement and had given to John D. Hankinson a receipt for $1,000, on account of the mortgage, as coming from Risdon Hankinson; the money was in shape of a check which was for a larger amount than $1,500, as I remember it; Mr. Becher wanted the money or a certified check; Risdon Hankinson and Becher went to the bank, and returned to my office after a short interval; the money was paid to Mr. Becher in my presence, and was paid by Risdon Hankinson, on the express condition which I then and there in the presence of all of them stated, to wit, that he, Risdon Hankinson, should be subrogated to and have an interest in the Fairbairn mortgage for the moneys he so advanced to be paid thereon; and as Mr. Becher resided out of the state, he agreed to sign a paper, to be drawn up by himself, reciting the facts of the payments by Risdon Hankinson of the several sums of $1,000 and $1,500, on account of the mortgage, and containing an agreement that Risdon Hankinson should have an interest in the mortgage to the extent of the sums so paid by him, but which should be subject and subsequent to the interest retained by him; the interview closed before such paper could be drawn, as Mr. Becher was desirous of returning to Philadelphia on a train then about ready to start."

Both the Hankinsons corroborate him in this statement. In op-

position, the testimony of Mr. Charles E. Hendrickson, who was Becher's attorney, is produced. The material portions of his testimony are to the effect that, before the payment of April, 1877, was made, John B. Hankinson called on him and desired to know whether Becher could not make an assignment of an interest in the mortgage to secure Risdon, if the latter should lend him the money to pay on the mortgage; that Mr. Hendrickson replied, saying that he had doubts whether such an assignment was feasible; that Hankinson then requested him to draw some paper of that kind and get Becher to sign it; that Mr. Hendrickson declined, saying he could do nothing about it until after he had consulted Becher; that Hankinson requested him to see Becher on the subject; that Becher afterward came to his office to see him about the matter and inquired whether he could make such an assignment without prejudice to himself as executor, or to the Fairbairn girls, to whom he expected to assign the mortgage, expressing his willingness to make the assignment, if it would not prejudice him or his assignees; that Mr. Hendrickson advised him against making the assignment; that Hankinson called on Mr. Hendrickson again, and the latter told him what advice he had given to Becher, and that Hankinson urged upon him the contrary view of the matter, insisting that the assignment could and ought to be made, but Mr. Hendrickson declined to advise Becher to make it. Mr. Hendrickson further says that when, or soon after, the payment was made, Risdon Hankinson called on him, and, after Mr. Hendrickson had communicated to him Becher's unwillingness to make the assignment, Hankinson requested him to draw a paper stating that he, Hankinson, had paid the money. He did so, and Hankinson signed it, and left it with Mr. Hendrickson. That paper was in form a certificate that Risdon Hankinson had paid to Becher, for his brother John, $1,500, on account of the bond and mortgage; that he consented that that money should be indorsed on the mortgage as received from him, and that he claimed an interest for that money in the mortgage, but made no personal claim for it against Becher or Fairbairn's estate, or any person to whom the bond and mortgage should be assigned. The paper is dated April 30, 1877. The $1,500 were paid on the 24th of that month, six days previously. This paper is evidence that Risdon Hankinson, when he paid the money mentioned therein, looked to the mortgage as security for it. Becher's agreement to assign, testified to by Mr. Barrows, was made on the day the $1,500 were paid—April 24th. John B. Hankinson swears that when the payment of August, 1876 —$1,000—was made, there was an agreement between Becher and him that when the whole of the $2,500 was paid Risdon should have an interest in the mortgage to that amount. Becher never made the assignment. It may be that Risdon Hankinson, being apprehensive that Becher would not make the assignment according

to his promise, conceived the expedient of putting his claim in writing, and leaving it with Becher's attorney. The testimony of Mr. Hendrickson does not countervail or contradict that of Mr. Barrows and the Hankinsons. Nor is the fact that when Mrs. Shreve took the assignment of the mortgage, John B. Hankinson certified on the mortgage that there was then due thereon $9,000 of principal and $165 of interest, at all significant. The certificate was not made by Risdon Hankinson, but by John B. Hankinson, and it was intended to estop him from denying that these amounts of principal and interest were recoverable by the holder of the mortgage, under assignment from the Fairbairns. It is clear from the evidence that Becher agreed that if Risdon Hankinson would advance the $2,500 to be paid on account of the principal of the mortgage, he would give him, for security for the repayment thereof, an assignment of an interest to that amount in the mortgage; the remaining principal, and the interest thereon, to have priority over Risdon Hankinson's claim.

It is urged, on behalf of Vanderbeck, that the rule which denies subrogation in case of merely partial payment is fatal to that claim. But that rule is not applicable to this case. Risdon Hankinson's claim is for conventional, not legal, subrogation. A stranger, who, by the authority and consent of the debtor, and on his agreement that he shall be subrogated to the rights of the creditor, makes payment for the debtor, will be subrogated if the payment is made with the express declaration of the subrogation in the release made by the creditor. Dixon on Subr. 164. The debtor and creditor in this case expressly agreed with Risdon Hankinson that if he would furnish the $2,500 he should have an assignment of the mortgage pro tanto to secure the repayment of the money. It would be against equity to deny Risdon Hankinson the benefit of that agreement. The fact that Becher did not fulfil his promise to assign could not, of course, avail him. If he were still the holder of the mortgage, he could not successfully resist the claim. No right of the complainant claiming under assignment through him will be affected by according it. Nor will any injustice be done to Vanderbeck in allowing it if he succeeds in reinstating his mortgage, for the payments in question were made after he took his mortgage. There will be a decree directing that the property be sold to raise, in the first place, the amount due the complainant, with her costs; and, in the next place, the $2,500 and interest due Risdon Hankinson, with his costs. Vanderbeck's mortgage is, as before stated, in litigation. He proposes to appeal from the decree in his suit, and asks that the sale of the mortgaged premises be deferred until after the determination of his appeal; that is, he seeks to stay the sale and prevent the raising of the money on the complainant's mortgage until he shall have ascertained, by means of the appeal, whether he has any interest in the property to protect. It would obviously be unjust to accord his request.

CHAPTER VI

THE RIGHT OF CONTRIBUTION

SECTION 1. NATURE OF THE RIGHT OF CONTRIBUTION

OFFLEY *v.* JOHNSON

2 *Leonard* 166 (*pl.* 202) (1584).

Offley and Johnson were bound as sureties with one A to B, who recovered against Johnson in London, and had execution against him; and now Johnson sued Offley, to have of him contribution to the said execution, ut uterque corum oneratur pro rata, according to the custom of London: Offley removed the cause by privilege into the King's Bench, whereupon came Johnson, and prayed a procedendo; and because upon this matter no action lieth by the course of the common law, but only by custom in such cities, the cause was remanded; for otherwise the plaintiff should be without remedy: See the Book of Entries, 160.

LAYER *v.* NELSON

1 *Vern.* 456 (1687).

Where one obligee that is a surety is sued alone, by the custom of the city of London he shall make his cosureties contribute; so where a surety pays a debt, and has no counter-bond, by the custom of the city of London he shall maintain an action against the principal.

Note: Formerly, the remedy of one surety against another for contribution was only in equity; it is now well settled that assumpsit lies. Birkley v. Presgrave, 1 East. 220; Bachelder v. Fiske, 17 Mass. 464; Mitchell v. Sproul, 28 Ky. 264.

ESTATE OF KOCH

148 *Wis.* 548, 134 *N. W.* 663 (1912).

Three persons, John C. Koch, deceased, Henry A. Koch, the respondent, and one Loeber, signed a guaranty of certain debts of a corporation in which all were stockholders. Subsequently, one became bankrupt and later a second bought the stock owned by the third, giving his promissory notes therefor. Later the vendee died, not having paid his notes, and leaving, as part of his estate, a controlling interest in the stock. Substantially all the balance of the stock belonged to his sons. The estate was compelled to pay a large sum on the guaranty. Plaintiff made a claim against the estate for the amount due on his notes. The administrator for an offset, pleaded that the claimant was liable for his due proportion of the sum paid on the guaranty. Such offset was allowed in county court. It was disallowed on appeal to circuit court. * * *

Marshall, J.: The judgment must be affirmed. Not because it is grounded upon altogether legitimate logic, but because it is right.

Compulsory contribution between cosureties does not rest in mere equity though, true, such is the origin of the law. The individual chancellor can not, as an original proposition, do in such case what he may think will fit the facts from the standpoint of justice in the abstract. He can not merely seize upon his ideal in the moral sense and vitalize it by a decree. That would make contribution depend on arbitration in the habiliments of judicial administration. Contribution is dependable upon petty definitely established legal rules, applicable to situations which may vary greatly as regards facts, but fall into pretty well defined general classes. The facts dependable upon concession or evidence, or both, being found, the class and result are governed by the law. The court is to apply the law as it is given, not make it for the found situation. True, originally, there was a mere doctrine of contribution. True, like a great body of our law, it originated in judicial administration, unguided by written law or any rule, or anything but the chancellor's sense of justice and conception of means to effectuate it.

Doubtless, "sense of right developed sense of duty." Continuing the logic: sense of duty developed sense of moral obligation; sense of moral obligation, intensified by contemplation of the mischiefs incident to its violation, developed sense of necessity for compulsory responsibility; the latter developed sense of need for remedial justice. At that point of growth progress waited for its crowning effort. There was no written law to meet the case; none was offered. Then the boundless source of instrumentalities for

coping with human transgressions, with its ready means, or power of invention thereof, for reparation of every wrong above mere moral infractions best dealt with by one's own conscience and sensibility to the rewards and punishments afforded by social environment; a source as limitless and fruitful as man's capacity to wrong his fellowmen; that one in which has originated more of the beneficial regulations of human conduct found in the scientific ethics of the law, than in all the legislatures of a century—equity vitalized by its human conscience, furnished the needed remedy, recognizing the primary right, duty and obligation with an environment of correlative rights, duties and obligations, in all an entirety with mutually dependable elements fixing limitations and conditions.

The thought was that joint sureties, nothing appearing to the contrary, must naturally expect to share the burdens assumed, on a basis of equality, and, as equality means equity, it was competent to enforce it in chancery. In such enforcement there was necessity for consistency, recognizing the universal rule that he only has enforcible equity who does equity. This latter was important, since it was seen that the ground of equity upon the one side raised the duty upon the other to share equally any advantages obtained, directly or indirectly, from the principals, as regards immunity from, or indemnity for, risk, and to use other advantages, such as actual control of the source for discharge of the principal obligation, with reasonable care and for mutual benefit.

So from the very nature of the matter the whole subject of contribution was at first and for a long time dealt with solely in equity, taking, however, more and more, with the lapse of time, the form of a definite judicial code, appropriate to a proper standard, in moral conception, of business ethics. Those rules, being well established and universally applied with quite as much certainty as legal rules, strictly so called, or rules dependable upon written law, came to be regarded as automatically written into every contract of guaranty, nothing appearing efficiently to the contrary, and enforcible at law as well as in equity.

Now the logic of the enforcibility of contribution, at law as well as in equity, is that there is a real right of contribution growing out of the relations of the parties, not a mere privilege to be extended or not in judicial discretion. The right may be contracted away or lost by violation of some correlative right, but it is not within the province of the court, as an original matter, to give it or take it away. The right, inchoate, has its inception at the time of signing the guaranty. It sleepeth, so to speak, till aroused into life, by compulsory payment by one of more than his share of the loss. Upon others refusing to make good, there is a violated right creating a cause of action of legal or equitable cognizance, or both. That cause of action is defendable against by a violated right, in case of there being any; having regard to the equitable duties of the par-

ties to each other as established in the law, and in contemplation of which they are presumed to have agreed in joining in the guaranty. The idea is not that any express contract exists between cosureties upon which an action will lie, but that there is a contract implied, growing out of the relations of the parties—a contract which is contemporaneous with the signing of the guaranty, not which springs up by overpayment by a surety. The latter fixes the right in accordance with the implied contractual obligation made at the start, that the solvent resident guarantors will share equally any loss resulting from the suretyship.

Said this court in Hardell v. Carroll, 90 Wis. 350, 63 N. W. 275, quoting from a standard author:

"The right of contribution is an equity which springs up at the time two or more persons assume as to each other the relation of cosureties for a common principal, and ripens into a cause of action when one of the sureties pays more than his proportion of the debt for which all were liable."

While it is an equity the right to the equity is legal as well as equitable, because the parties are presumed to have agreed that the right shall exist, and so legal as well as equitable remedies are available to redress its violation. Mason v. Pierron, 63 Wis. 239, 23 N. W. 119; Bushnell v. Bushnell, 77 Wis. 435, 46 N. W. 442; Faurot v. Gates, 86 Wis. 569, 57 N. W. 294; Boutin v. Etsell, 110 Wis. 276, 85 N. W. 964; Fanning v. Murphy, 126 Wis. 538, 548, 105 N. W. 1056.

"The liability of a surety to contribute to one who has paid more than his share of the common debt, is one that is now recognized and enforced both at law and in equity."

The time was that the paying surety in an action could only recover from his cosurety an aliquot part of the whole debt; regard being had to the number of sureties, and without regard to the insolvency or nonresidence of any of them. The considerations before mentioned induced a modification of this rule, so that it may be said to be established law in this state, as well as others, that, when one surety has paid the whole debt, he may compel contribution from such of his cosureties as are solvent and within the state." Boutin v. Etsell, supra.

"In contemplation of law, the act" of payment by a surety, the principal having defaulted, is characterized by a request from the cosurety, if there be such, to the one acting in the manner to pay the debt, and a promise on the part of the former, "implied from the obligation assumed to have been entered into at the start," to contribute his proper proportion. Thus a cosurety is liable to contribute to the one making the payment, both upon the ground of equitable and legal obligation." Fanning v. Murphy, supra.

As before indicated, the right of contribution may be parted with to cosureties by contract, or lost to the extent that prejudicial breach

of duty to the cosureties would otherwise proximately cause loss to them, and may be forfeited in some other ways definitely established in the law.

Consistent with the principle that each surety, impliedly, by joining in the guaranty, contracts not to take any special advantage, growing out of means of immunity from, or indemnity for, loss, secured from the principal during the existence of the contract of guaranty, and to reasonably conserve for the common protection property of such principal under his control, forming a legitimate means of such protection, it has been held as follows: Where a surety bought in the principal claim at a discount he can only claim contribution as to the amount paid. Tarr v. Ravenscroft, 12 Gratt. 642; Derosset v. Bradley, 63 N. Car. 17. A surety who pays in depreciated currency can only have contribution on the basis of its value, such currency not being a legal tender. Edmonds v. Sheahan, 47 Tex. 443. A surety who receives security from his principal, although the latter intends it especially for the individual benefit, is required to apply the same for the benefit of all. Fuller v. Haggood, 39 Vt. 617, 620. A cashier of a bank in which a principal obligor is a depositor who is an associate surety for a liability of such principal, having received a check from such principal on his account in the bank to discharge such obligation, which he negligently for some days omits to efficiently use by transmitting the money as requested, and in the meantime the bank fails, causing the principal debtor to make default—is, by reason of breach of duty to his cosureties to use his special knowledge of the situation and instrumentalities placed in his hands to protect all liable, as between them, for the entire loss. Crisfield v. Murdock, 127 N. Y. 315, 27 N. E. 1046. A cosurety who receives indemnity must share it with his associates and, if having full indemnity he releases it, he forfeits the right of contribution. Sherman v. Foster, 158 N. Y. 587, 594, 53 N. E. 504. If a cosurety takes a chattel mortgage to indemnify himself and voluntarily discharges it without consent of his associates, they may efficiently plead such discharge as a legal defense to a claim against them for contribution. Ramsey v. Lewis, 30 Barb. 403. If a surety procures, or negligently allows, forced sales of the principal debtor's property and buys it in at a manifestly inadequate price, he is chargeable with the full fair value as regards his right of contribution. Sanders v. Weelburg, 107 Ind. 266, 7 N. E. 573. If a cosurety obtains from the principal a mortgage upon chattels, in form to secure himself against loss by reason of becoming a party to the surety contract, he thereby becomes a trustee of such security for the benefit of all of the sureties, and if he loses the advantage by negligence, he commits a wrong to his associates, remediable by forcing an accounting as to the security, charging such loss to him, or by way of defense to his claim for contribution. Steele v. Mealing, 24 Ala. 285;

Taylor v. Morrison, 26 Ala. 728; Caryton v. Johnson, 27 Ala. 503; Paulin v. Kaighn, 29 N. J. L. 480.

All such instances were ruled by settled results, in the law, for violation of recognized duties—not by the court's mere conception, in any case, as an original matter, of what was just.

We are compelled, seemingly, to go elsewhere for illustrations of the principles above stated. Though there is an abundance of instances where they have been applied, there is dearth of such in the history of our own jurisprudence. Such principles are so well entrenched, as of legal as well as equitable cognizance, that modern text-writers turn the matter off by the mere statement that "the right to contribution may be destroyed, by a subsequent contract of the parties, or by the fault of the party who causes the loss toward which he seeks contribution from his co-obligor." 9 Cyc. 804.

Of particular significance here is the fact that both in law and equity, a cosurety is a quasi-trustee for his associates of all special advantages he acquires from the principal debtor—either in adversary proceedings or otherwise—for the benefit of the bearers of the common burden, with all the duties incident to such relation. He can not specially profit out of it. He is liable for loss proximately caused to his associates by failure to honestly and with reasonable care perform his legal duty to his associates—to reasonably conserve his special advantages for the common benefit; this having regard to acts of omission as to facilities under his control, or commission respecting fraudulently or negligently dissipating the means of paying the principal debt, or indemnity for losses occasioned by failure to pay—especially indemnity derived from the business regarding which the liability has its origin. The duty in this regard is as strictly legal, though based on equitable principles, as it is plainly moral.

The foregoing, somewhat lengthy discussion, is for the purpose of showing that, upon the facts appearing, vitalizing, in the absence of anything of a defensive character, the right of contribution, what is matter of defense is dependable upon definite legal principles though they may be founded in equitable considerations. The inquiry is, was the right parted with by contract, or was it, in whole or in part, forfeited by breach of duty of some sort? What breaches, in general, constitute a defense to the claim for contribution, are well defined in the law—so well that the facts being found, whether they constitute a defense or not, is matter of law, not matter of discretion. The issue may be presented in a legal or equitable action. If the latter, the court finds the facts and applies thereto the established rules of law. In the former, the jury finds the facts from the evidence, as in any other case, and the court applies thereto, subsequently, the appropriate rules of law, or directs the jury how to find as a result of their determination of the contro-

verted facts according to whether the verdict is special or general. * * *

Accord: Russell v. Failor, 1 Ohio St. 327, 59 Am. Dec. 631.
The right to contribution is not affected by the fact that one of two sureties is a surety for compensation, while the other is a surety for accommodation. United States Fidelity &c. Co. v. McGinnis, 147 Ky. 781, 145 S. W. 1112.

SECTION 2. PARTIES ENTITLED TO THE RIGHT

(a) Sureties Bound by Different Instruments

SIR EDWARD DEERING *v.* THE EARL OF WINCHELSEA, SIR JOHN ROUS, AND THE ATTORNEY-GENERAL

P

2 *B. & P.* 270 (1787).

Lord Chief Baron Eyre (present Hotham and Perryn, Barons) delivered the opinion of the court.

Thomas Deering, younger brother of the plaintiff, was appointed in 1778 receiver of fines and forfeitures of the customs of the outports, and entered into three bonds, each in the penalty of £4,000, with condition for duly accounting; in one of which the plaintiff joined as surety, in another Lord Winchelsea, and Sir John Rous in the third. Thomas Deering became insolvent, and left the country; the balance due to the crown was £6,602 10s. 8d., part of which was levied on his effects, and when the bill was filed, there was due £3,383 14s. 8½d., which was rather less than the penalty of each of the bonds. The bond in which the plaintiff had joined was put in suit against him, and judgment obtained. He filed his bill demanding contribution against Lord Winchelsea and Sir John Rous, and praying an account of what was due to the crown, and money levied on the plaintiff (supposing execution to follow the judgment), and that Lord Winchelsea and Sir John Rous might contribute to discharge the debt of Thomas Deering as two of the sureties of that debt. The appointment, the three bonds, and the judgment against the plaintiff, were in proof, and the balances were admitted by all parties.

The Lord Chief Baron after stating the case, observed, that contribution was resisted on two grounds; first, that there was no foundation for the demand in the nature of the contract between the parties, the counsel for the defendants considering the title to contribution as arising from contract expressed or implied; secondly, that the conduct of Sir Edward Deering had deprived him of the benefit of any equity, which he might have otherwise had against the defendants.

The Lord Chief Baron considered the second objection first. The misconduct imputed to Sir E. Deering was, that he had encouraged his brother in irregularities, and particularly in gaming, which had ruined him, and had done this knowing his fortune to be such that he could not support himself in his extravagances, and faithfully account to the crown; that Sir E. Deering was privy to his brother's breaking through the orders given him to deposit the money he received in a chest under the key of the comptroller. His Lordship observed, that this might be true, and certainly put Sir E. Deering in a point of view, which made his demand indecorous; but it had not been made out to the satisfaction of the court, that this constituted a defense. Mr. Maddocks had stated that the author of the loss should not have contribution; but stated neither reason nor authority to support the principle he urged. If these were circumstances which could work a disability in the plaintiff to support his demand, it must be on the maxim, "that a man must come into a court of equity with clean hands;" but general depravity is not sufficient. It must be pointed to the act upon which the loss arises, and must be in a legal sense the cause of the loss. In a moral sense Sir E. Deering might be the author of the loss; but in a legal sense, Thomas Deering was the author; and if the evil example of Sir E. Deering led him to it, yet this was not what a court of justice could take cognizance of. There might, indeed, be a case in which a person might be in a legal sense the author of the loss, and therefore not entitled to contribution; as if a person on board a ship was to bore a hole in the ship, and in consequence of the distress occasioned by this act, it became necessary to throw overboard his goods to save the ship. This head of defense therefore fails. The real point is, whether there shall be contribution by sureties in distinct obligations?

It is admitted, that if they had all joined in one bond, for £12,000, there must have been contribution. But it is said to be on the foundation of contract implied from their being parties in the same engagement, and here the parties might be strangers to each other. And it was stated, that no man could be called upon to contribute who is not a surety on the face of the bond to which he is called to contribute. The point remains to be proved, that contribution is founded on contract. If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract. Contract, indeed, may qualify it, as in Swain v. Wall, 1 Ch. Rep. 149, where three were bound for H. in an obligation, and agreed if H. failed to bear their respective parts. Two proved insolvent, the third paid the money, and one of the others becoming solvent, he was compelled to pay a third only.

There are in the Register, fo. 176.b. two writs of contribution, one, "De contributione facienda inter cohaeredes," the other, "De

feoffamento;" these are founded on the statute of Marlbridge, 52 H. 3. c. 9. which enacts "that if any inheritance, whereof but one suit is due, descends unto many heirs, as unto parceners, whoso hath the oldest part of the inheritance, shall do that one suit for himself and fellows, and the other coheirs shall be contributaries according to their portion for doing such suit. And if many feoffees be seized of an inheritance whereof but one suit is due, the Lord of the fee shall have but that one suit, and shall "not exact of the said inheritance but that one suit, as hath been' used to be done before. And if these feoffees have no warrant "or means which ought to acquit them, then all the feoffees according to their portion shall be contributaries for doing the suit for them." The object of the statute was to protect the inheritance from more than one suit. The provision for contribution was an application of a principle of justice. In Fitzh. N. B. 162. B. there is a writ of contribution where there are tenants in common of a mill, and one of them will not repair the mill, the other shall have the writ to compel him to contribute to the repair. In the same page, Fritzherbert takes notice of the writs of contribution between coheirs and co-feoffees; and supposes that between feoffees the writ can not be had without the agreement of all and the writ in the register countenances the idea; yet this seems contrary to the express provision in the statute. In Sir William Harbet's case, 3 Co. 11 b. many cases are put of contribution at common law. The reason is, they are all in aequalia jure, and as the law requires equality, they shall equally bear the burden. This is considered as founded in equity; contract is not mentioned. The principle operates more clearly in a court of equity than at law. At law, the party is driven to an audita querela or scire facias to defeat the execution, and compel execution to be taken against all. There are more cases of contribution in equity than at law. In Equity Cases Abridged there is a string under the title "Contribution and Average." Another case at law occurred in looking into Hargrave's Tracts in a treatise ascribed to Lord Hale on the prisage of wines. The King's title is to one ton before the mast, and one ton behind the mast. If there are different owners, they may be compelled in the Exchequer Chamber to contribute. Contribution was considered as following the accident on a general principle of equity in the court in which we are now sitting.

In the particular cases of sureties, it is admitted, that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments? In every one of these cases sureties have a common interest and a common burden. They are bound as effectually quoad contribution as if bound in one instrument, with this difference only, that

the sums in each instrument ascertain the proportions, whereas if they were all joined in the same engagement they must all contribute equally.

In this case, Sir E. Deering, Lord Winchelsea, and Sir F. Rous, were all bound that Thomas Deering should account. At law all the bonds are forfeited. The balance due might have been so large as to take in all the bonds; but here the balance happens to be less than the penalty of one. Which ought to pay? He on whom the crown calls must pay to the crown; but as between themselves they are in aequali jure, and shall contribute. This principle is carried a great way in the case of three or more sureties in a joint obligation; one being insolvent the third is obliged to contribute a full moiety. This circumstance, and the possibility of being made liable to the whole, has probably produced several bonds. But this does not touch the principle of contribution where all are bound as sureties for the same person.

There is an instance in the civil law of average, where part of a cargo is thrown overboard to save the vessel. Shaw. Parl. Cas. 19 Moor. 297. The maxim applied is qui sentit commodum sentire debet et onus. In the case of average there is no contract express or implied, nor any privity in an ordinary sense. This shows that contribution is founded on equality, and established by the law of all nations.

There is no difficulty in ascertaining the proportions in which the parties ought to contribute. The penalties of the bonds ascertain the proportions.

The decree pronounced was, that it being admitted by the attorney-general, and all parties, that the balance due was £3,883 14s. 8½d. the plaintiff, Sir E. Deering, and the defendants, the Earl of Winchelsea and Sir F. Rous, ought to contribute in equal shares to the payment thereof, and that they do accordingly pay each £1,294 11s. 6¼d. and on payment the attorney-general to acknowledge satisfaction on the record of the judgment against the plaintiff, and the two bonds entered into by the Earl of Winchelsea and Sir F. Rous to be delivered up.

This being a case which the court considered as not favorable to Sir E. Deering, and a case of difficulty, they did not think fit to give him costs.

Accord: Loring v. Bacon, 3 Cush. (Mass.) 465; Bell v. Jasper, 37 N. Car. 597; Moore v. Hanscom, 103 S. W. (Tex.) 665; Remage v. Marple, 76 W. Va. 379, 85 S. E. 663.

But see Assets Realization Co. v. American Bonding Co., 88 Ohio St. 216, 102 N. E. 719, Ann. Cas. 1915A, 1194.

CHARLES F. YOUNG *v.* JACOB SHUNK ET AL.

30 *Minn.* 503, 16 *N. W.* 402 (1883).

Plaintiff brought this action in the district court for Goodhue county against defendants, as cosureties with himself, seeking to enforce contribution from them. The action was tried before McCluer, J., and a jury, and, when both parties rested, the court, on defendant's motion, directed a verdict in their favor.

From the uncontradicted evidence offered and received on the trial, it appeared that the defendants executed and delivered to the Davis Sewing-Machine Company their written guaranty, to the amount of $2,000, dated June 26, 1876, for the performance by one Paulson of a certain contract made by him with the company on the same day; that subsequent to the making of defendants' guaranty, plaintiff also executed and delivered to the same company his written guaranty for the performance of the same contract, dated on the same day, and in the same words as defendants' guaranty, excepting that it was only to the amount of $1,000; that afterward, Paulson having failed to perform his contract, the company brought suit against plaintiff upon his guaranty, and recovered judgment for its amount, which judgment plaintiff paid, and that plaintiff gave defendants due notice of such suit. It also appeared from plaintiff's evidence that, after defendants had executed their guaranty, it was presented by Paulson to plaintiff for his signature, and he refused to sign it, stating "that he would not sign a bond with anybody else; that he would become individually responsible for $1,000, for Mr. Paulson."

A motion for a new trial was denied, the court holding that the contracts of guaranty on their faces are distinct; that "evidence must be looked for outside of these instruments to connect them together and show that they refer to the same duty," and that the evidence introduced shows "that plaintiff did not intend the transactions should be connected, refused to sign a joint bond, and executed this independent obligation for the purpose of disconnecting himself entirely from the defendants," and citing and relying on Norton v. Coons, 3 Denio 130. Plaintiff appeals from the order refusing a new trial.

Gilfillan, C. J.: Martin Paulson entered into a contract with the Davis Sewing-Machine Company. The defendants, by an instrument under seal, guarantied, to the amount of $2,000, the performance by Paulson of said contract. Afterward, plaintiff, by a separate instrument under seal, guarantied, to the amount of $1,000, the performance by Paulson of the same contract. The plaintiff, having been compelled to pay the $1,000 by reason of Paulson's failure to fulfil his contract, brings this action to enforce contribu-

tion from defendants. They insist that he and they were not cosureties.

Persons are cosureties, so as to give the right of contribution, when they are bound for the performance by the same principal of the same duty; and whether they become so at the same time or at different times, by one or by several instruments, and even that they are bound in different amounts, or that each is ignorant that the others are sureties, does not affect the relation nor the right. The right does not seem to rest upon contract (for a contract can not be assumed between persons who may each be ignorant of the other's existence), but upon this natural principle of equity, that where the same burden is assumed equally by several, and one of them is compelled to discharge it, the others ought to contribute each his share, so as to preserve equality.

As the obligation to contribute arises, not from contract between the cosureties but from the existence of that relation—that is, of sureties for the same principal and the same duty—it may be doubted that the intention of the surety in respect to contribution, at the time of becoming such, unless expressed in the way of a contract between him and the other sureties, will affect the right.

However, that may be, the evidence in this case does not make it appear that, at the time of becoming surety, the plaintiff intended to exclude the right or obligation of contribution. He made no objection to assuming the relation of cosurety, but objected only to executing the same instrument with the others. His reason for preferring to become surety by a different instrument was not given. It is going too far to assume that it was because he did not intend to contribute if one of the others paid, nor to call on them for contribution if he paid. It was error to direct a verdict for defendants. As the evidence stood, the verdict ought to have been for plaintiff.

Order reversed, and new trial ordered.

Stearns Suretyship, 2nd ed., § 264: "A supplemental surety, or one who engages to answer for the default of another who has already become bound as a promisor in suretyship, is not liable to contribution, since as to such promisor the earlier surety is in the relation of a principal debtor. The same is true of successive accommodation indorsers in the absence of special agreement to become jointly bound."

(b) One Who Becomes Surety at Request of a Cosurety

TURNER *v.* DAVIES

2 Esp. 478 (1796).

This was an action of assumpsit for money paid, laid out, and expended to the use of the defendant.

Plea of nonassumpsit.

The action was brought to recover from the defendant a moiety of the sum of £23 paid by Turner, the plaintiff, on account of the debt of one Evans, and arose under the following circumstances:

There being an execution in Evans's house, at the suit of Brough; to induce Brough to withdraw it, and to secure the debt, Turner, the plaintiff, and Davies, the defendant, joined in a warrant of attorney to Brough; but Davies had joined in consequence of having been applied to by Turner, and Brough, who required an additional security. Turner, the plaintiff, took a bill of sale from Evans for his own security, dated 20th of January, 1796; and an indorsement was made on it, declaring the purpose for which it was given.

Another execution having issued against Evans, the goods were taken in execution, and Turner, the plaintiff, had paid the whole of Brough's demand, and now brought this action against the defendant for contribution of the moiety.

Lord Kenyon: I have no doubt, that where two parties become joint sureties for a third person, if one is called upon and forced to pay the whole of the money, he has a right to call on his cosecurity for contribution; but where one has been induced so to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretense for saying that he shall be liable to be called upon by the person at whose request he entered into the security. This is the case here; Davies the defendant, became security, at the instance of Turner, the plaintiff, to Brough, and there is still less pretext for Turner to call on the defendant in this action, so he took the precaution to secure himself by a bill of sale. I am of opinion the defendant ought to have a verdict.

The jury found for the defendant.

BAGOTT ET AL. *v.* MULLEN

32 *Ind.* 332, 2 *Am. Rep.* 351 (1869).

RAY, J.: Complaint against appellants, charging that, in 1864, the state, on relation of Hasselman and another, recovered a judgment against one Vandever, as sheriff, and the appellee, and the appellants, upon an official bond, a copy of which judgment is filed with the complaint; that said Vandever is notoriously insolvent; and that appellee has been compelled to pay said judgment in full, and demands contribution from the appellants.

A sixth paragraph of answer was filed, which averred that process was not served personally on the appellants in the suit upon which the judgment was rendered, and that neither of the appellants appeared to the action; but that the appellee, without authority, appeared for them and suffered judgment to be entered against them, to defraud them, and entered into a special contract with the relators to pay the said judgment with funds belonging to the said defendant Vandever, then in the hands of the said appellee, and, in consideration of said agreement, received an extension of time, for one year, on said judgment; that but for such extension of time, the sum named in said judgment could have been made out of the property of said Vandever; and that said extension of time was given out of the knowledge of said appellants. It is also alleged that the appellants signed the official bond of Vandever from which the liability arose, at the request of the appellee.

A demurrer was sustained to this paragraph. * * *

There remains, then, the averment that the appellants signed the bond of Vandever, as sheriff, at the request of the appellee.

It is stated in Chitty on Contracts, that if the surety from whom contribution is claimed, become bound at the request of the surety who seeks to recover it, he is not liable; for in such a case the promise to contribute implied in law is negatived. 10th Am. Ed. 669. The cases cited as sustaining this rule, are Turner v. Davies, 2 Esp. 478; Thomas v. Cook, 8 B. & C. 728; Apgar v. Hiler, 4 Zabr. 812.

In the case first cited, Turner sued Davies to recover a moiety of a sum paid by him on account of the debt of one Evans. The foundation for the claim to contribution against Davies was this: There being an execution in Evans's house, at the suit of one Brough, to induce the execution plaintiff to withdraw it. Turner and Davies joined in a warrant of attorney to Brough, but Davies joined in consequence of having been applied to by Turner, and also by Brough, who required an additional security. Turner, the plaintiff, at the time, took a bill of sale from Evans for his indemnity. It was held, that Davies was not bound to contribute,

Turner having been compelled to discharge the debt of Evans. Lord Kenyon, while resting this case specially on the ground that Turner had secured himself by a bill of sale, declared, that where one has been induced to become security at the instance of another, though he thereby renders himself liable to the person to whom the security is given, there is no pretense for saying that he shall be liable to be called upon by the person at whose request he entered into the security.

The case of Thomas v. Cook, was where one signed as cosurety, at the request of a surety who agreed to save him harmless. It was held, that the promise to save harmless was a good defense to an action by the promisor. * * *

In Apgar v. Hiler, it was held, that where one of two sureties becomes such at the request of his cosurety and upon his promise that he will be put to no loss, he may recover the whole of what he may have been compelled to pay of his cosurety. * * *

In all these cases there was something more than a mere request by one surety to another to execute the note or paper as cosurety. There was either a promise written or verbal to indemnify, or a taking of security from the principal, and from either of these circumstances the courts hold such surety released from contribution.

* * * * * * * * * *

Are we then, to follow the broad doctrine declared by Lord Kenyon, and the application of which was, in fact, uncalled for in the case before him—a case decided at nisi prius—and never heretofore applied by any court, and hold the surety discharged by the simple request of his cosurety to sign the obligation?

If a surety making the request, receive any personal benefit from the execution of the obligation—as where the money raised thereon goes into his hands, or where he has already incurred a liability upon an instrument completed by delivery—we can see a propriety in the court treating the person thus benefited and making the request, as a principal, and the person signing at such request as his surety only and not liable to contribute for his benefit. So, where the signature is upon an express contract to indemnify, the consideration supports the promise and discharges the surety from the legal obligation otherwise resting upon him.

But where parties standing in an equal relation to the principal sign as sureties for that principal, the one at the request of the other, we are not satisfied that any sound principle of law or equity will discharge either from the legal obligation he assumes on the face of the instrument to contribute his proportion on default of the chief obligor. Indeed, the adoption of such a rule would be, in this state, contrary to the prevailing practice and understanding of parties to such contracts and most disastrous in its consequences. Few officials present their bonds in person for execution by their

friends as their sureties; but the bond is executed at the request of a mutual friend; and no one has supposed that in case of loss the liability, as between the sureties, must rest upon that friend, who has simply been most active in the promotion of a common object.

In our opinion, therefore, the averments of the sixth paragraph of the answer were not sufficient to constitute a defense to the action, and the demurrer was properly sustained.

Judgment affirmed, with two per cent. damages and costs.

See also McKee v. Campbell, 27 Mich. 497.

SECTION 3. WHEN THE RIGHT ARISES

DAVIES *v.* EVAN HUMPHRIES

6 *M. & W.* 153 (1840).

PARKE, B.: This was an action by the plaintiff against the defendant, his cosurety on a promissory note, dated the 27th of October, 1827, for the sum of £300, with interest, to recover a moiety of the whole amount which he had paid to the payee. A rule granted in this case, as well as one which was granted in another action on same note against the principal, was argued in the Sittings after Trinity Term. In the course of the last Term, the court disposed of the rule in the latter action, and one of the questions in this having reserved for further consideration the question, at what time the right of one cosurety to sue the other for contribution arises.

This right is founded not originally on contract, but upon a principle of equity, though it is now established to be the foundation of an action, as appears by the cases of Cowell v. Edward, 2 B. & P. 269, and Craythorne v. Swinburne, 14 Ves. 164; though Lord Eldon has, and not without reason, intimated some regret that the courts of law have assumed a jurisdiction on this subject, on account of the difficulties in doing full justice between the parties. What then is the nature of the equity upon which the right of action depends? Is it that when one surety has paid any part of the debt, he shall have a right to call on his cosurety or cosureties to bear a proportion of the burden, or that, when he has paid more than his share, he shall have a right to be reimbursed whatever he has paid beyond it? Or must the whole of the debt be paid by him or some one liable, before he has a right to sue for contribution at all? We are not without authority on this subject, and it is in favour of the second of these propositions, Lord Eldon, in the case of Ex parte Gifford, 6 Ves. 805, states, that sureties

stand with regard to each other in a relation which gives rise to this right among others, that if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion which, in all events, he is to pay: and he expressly says, "that unless one surety should pay more than his moiety, he would not pay enough to bring an assumpsit against the other." And this appears to us to be very reasonable, for, if a surety pays a part of the debt only, and less than his moiety, he can not be entitled to call on his cosurety, who might himself subsequently pay an equal or greater portion of the debt; in the former of which cases, such cosurety would have no contribution to pay, and in the latter he would have one to receive. In truth, therefore, until one has paid more than his proportion, either of the whole debt, or of that part of the debt which remains unpaid by the principal, it is not clear that he ever will be entitled to demand anything from the other; and before that, he has no equity to receive a contribution, and consequently no right of action, which is founded on the equity to receive it. Thus, if the surety more than six years before the action, have paid a portion of the debt, and the principal has paid the residue within six years, the Statute of Limitations will not run from the payment by the surety, but from the payment of the residue by the principal, for until the latter date it does not appear that the surety has paid more than his share. The practical advantage of the rule above stated is considerable, as it would tend to multiplicity of suits, and to a great inconvenience, if each surety might sue all the others for a ratable proportion of what he had paid, the instant he had paid any part of the debt. But, whenever it appears that one has paid more than his proportion of what the sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and the action will lie for it. It might, indeed, be more convenient to require that the whole amount should be settled before the sureties should be permitted to call upon each other, in order to prevent multiplicity of suits; indeed, convenience seems to require that courts of equity alone should deal with the subject; but the right of action having been once established, it seems clear that when a surety has paid more than his share, every such payment ought to be reimbursed by those who have not paid theirs, in order to place him on the same footing. If we adopt this rule, the result will be, that here, the whole of what the plaintiff had paid within six years will be recoverable against the defendant, as the plaintiff had paid more than his moiety in the year 1831; and consequently the rule must be absolute to increase the amount of the verdict from £15 to £30.

Rule accordingly.

Accord: Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669.

BOUTIN ET AL., RESPONDENTS, *v.* ETSELL, APPELLANT

110 *Wis.* 276, 85 *N. W.* 964 (1901).

One Alonzo Knight was elected county treasurer of Rayfield county for the term commencing January, 1899. He executed a bond, with the plaintiffs, defendant and the others as sureties, to the county, and entered upon the discharge of his duties. During his term, Knight became a defaulter, and thereafter an action was commenced on his bond against his sureties. Service was made on seven of the sureties, including the plaintiffs herein. Four, including the defendant, were not found, and did not appear. The others interposed a defense in good faith, and employed counsel. Judgment was docketed against them February 1, 1897, for $6,673.62. Afterward the plaintiffs in this action secured a compromise with the county, and paid $2,000 and took an assignment of the judgment. They also paid over $388.50 for counsel fees and expenses in defending the action and securing the compromise. They bring this action against the defendant to compel him to pay one-fifth of the amount so paid by them upon the compromise, and for counsel fees, and expenses, claiming that the other sureties are either without the state or insolvent. The foregoing facts appear in the complaint. For answer, the defendant admitted the execution of the bond, the commencement of suit, the judgment and compromise as stated. and denied the other allegations. He also set up that two of the sureties, Nourse and McCamis, were dead, and had personal representatives within Bayfield county. The case was tried by the court with a jury. After the evidence was in, the parties stipulated that the only question that would be submitted to the jury was as to the alleged insolvency of the sureties, and of the estates of those shown to be dead; the other questions to be determined by the court. By a special verdict, the jury found the issue of insolvency as claimed by plaintiffs. The court made findings for plaintiffs, and directed judgment for plaintiffs for $477.70, and interest from December 10, 1897. From this judgment the defendant takes this appeal.

Bardeen, J.: A number of objections to the validity of the judgment as raised by defendant, which will be considered as presented.

1. He first raises the question whether this is an action at law or in equity. The complainant states a plain cause of action at law. It was so treated by the parties on the trial, and will so be considered here.

2. Next it is claimed that there were eleven sureties, and the facts show that plaintiffs have not paid more than their propor-

tionate share of the original judgment. This contention ignores the fact of the compromise. The ultimate liability of all the sureties to the county was fixed at $2,000, which was paid by the four plaintiffs. The compromise was one which resulted to the benefit of all the sureties, and, for the purposes of this action, must be considered as the basis of individual liability. The liability of a surety to contribute to one who has paid more than his share of the common debt is one that is now recognized and enforced both at law and in equity. It rests upon equitable grounds, and appeals to the conscience of the judge and the chancellor alike. The time was that the paying surety in an action could only recover from his co-surety an aliquot part of the whole debt; regard being had to the number of sureties, and without regard to the insolvency or non-residence of any of them. The consideration before mentioned induced a modification of this rule, so that it may be said to be established law in this state, as well as others, that, when one surety has paid the whole debt, he may compel contribution from such of his cosureties as are solvent and within the state. Smith v. Mason, 44 Nebr. 610; Stallworth v. Preslar, 34 Ala. 505; Werborn's Admr. v. Kahn, 93 Ala. 201; Faurot v. Gates, 86 Wis. 569; Hardell v. Carroll, 90 Wis. 350.

3. Another objection is that no recovery should have been allowed for attorney's fees paid in defense of the suit and securing a compromise. There is no claim that such fees are unreasonable, or that they were imprudently incurred, or that they were not incurred for the common benefit. On the contrary, it sufficiently appears that the plaintiffs acted as prudent men would have acted under the circumstances, and that such action resulted in a substantial benefit to all of the sureties. The following authorities justify the allowance of such fees and expenses: Backus v. Coyne, 45 Mich. 584; Marsh v. Harrington, 18 Vt. 150; Fletcher v. Jackson, 23 Vt. 581; Gross v. Davis, 87 Tenn. 226; 4 Am. & Eng. Ency. of Law 3, and note; 1 Brandt Suretyship & G. 283. We are referred to the case of Shepard v. Pebbles, 38 Wis. 374, as sustaining the defendant's contention. It was a case for contribution, and the writer of the opinion makes use of the following language:

"But we do not understand that the right to contribution extended to the costs incurred by the plaintiff, or paid by him, in the action brought in the circuit court. It does not appear that the defendant authorized the payment of those costs, or agreed in any way to be liable for his share of them, and there is no special count in the complaint which would warrant any evidence to show that he was responsible for them."

There are, no doubt, cases when the expense incurred by a surety should not be allowed, and possibly the situation was such in the case referred to as to justify that conclusion. An inspection of the case and briefs on file, and of the facts stated in the opinion,

fails to disclose the exact ground of the decision, any further than is disclosed by the language used. If the decision is made to rest upon the fact, that no foundation for the recovery was laid in the complaint, there is seeming justification for it. Otherwise it would seem to stand upon dubious ground. Since the decision in Faurot v. Gates, supra, there is no good reason for saying that, in actions of this kind, reasonable attorney's fees, prudently incurred for the common benefit of the sureties, may not be recovered.

4. Another objection, somewhat feebly suggested, is that the evidence does not sustain the jury's finding as to the insolvency of the estates of several of the deceased sureties. The evidence is not referred to or discussed by counsel. There is at least some evidence in the record to support the conclusion reached, and, counsel not deeming the point of sufficient importance to point out its weakness, we shall hold it sufficient.

5. The last objection urged is that there was no evidence that Alonzo Knight, the principal on the bond, was insolvent. A complete answer to this position is that, this being an action at law, no such evidence or finding was necessary. Thus, it is said in 1 Brandt Suretyship & G. 290: "In an action at law by a surety against his cosurety for contribution, the weight of authority seems to be that the insolvency of the principal need not be averred or proved."* See also, to the same effect, Smith v. Mason, 44 Nebr. 610; Goodall v. Wentworth, 20 Maine 322; Rankin v. Collins, 50 Ind. 158; Sloo v. Pool, 15 Ill. 47.

By the court: The judgment is affirmed.

BUSHNELL, RESPONDENT, *v.* BUSHNELL ET AL., APPELLANTS

77 *Wis.* 435, 46 *N. W.* 442, 9 *L. R. A.* 411 (1890).

Cole, C. J.: This is an action by a paying surety against a cosurety for contribution. Cross-appeals from the judgment were taken, and the questions arising will be considered without special reference to the case in which they relate. The main question is presented on the finding of the court below that the plaintiff is the owner and holder of the note mentioned in the evidence, which was signed by the parties to the action as sureties for their brother, Levi N. The note drew interest at the rate of ten per cent., and several payments were made upon it from time to time by the plain-

*A few jurisdictions hold that the insolvency of the principal is a condition precedent to the right of a surety to maintain an action for contribution. Rainey v. Yarborough, 37 N. Car. 249, 38 Am. Dec. 681; Hall v. Gleason, 158 Ky. 789, 166 S. W. 608.

tiff. As to these payments the six years bar of the statute of limitations was interposed, which the court sustained as to all payments except the one for $98, made January 29, 1880. As to that payment the circuit court held the plaintiff was entitled to recover the full amount thereof, with ten per cent. interest from the time it was paid, and that the action was barred as to the other payments.

The first question which will be considered is, was the six years statute of limitations applicable to the first six years payments made upon the note by the plaintiff? It is said by defendants' counsel that this action for contribution between sureties is founded upon an implied contract to contribute, and that a right of action accrues against the cosurety on each separate payment when made, when it is more than the equal share of the debt which the paying surety is bound to pay; and he says the case comes strictly within the limitation of subd. 3, § 4222, R. S., which bars an action upon an obligation or liability, express or implied, in six years, except those mentioned in the last two preceding sections. The decisions of the questions presented is clear upon the authorities. Says Mr. Justice Story: "Originally it seems to have been questioned whether contribution between sureties, unless founded upon some positive contract between them incurring such liability, was a matter capable of being enforced at law. But there is now no doubt that it may be enforced at law as well as in equity, although no such contract exists. And it matters not, in case of a debt, whether the sureties are jointly and severally bound, or only severally; or whether their suretyship arises under the same obligation or instrument, or under divers obligations or instruments, if all the instruments are for the same identical debt." 1 Story Eq. Jur. 495. In Davies v. Humphreys, 6 Mees. & W. 153, Baron Parke says the action for contribution arises upon a principle of equity, though it is now established to be the foundation of an action at law, and this is generally the language of the cases upon the subject.

The result of this view would seem to be, that the plaintiff's right of action upon the liability of the cosurety is limited to the six years from the time he pays the creditor more than his proportion of the debt. Angell thus states the rule, and such is the doctrine of the adjudications. Ang. Lim. 131 et seq.; Davies v. Humphreys, supra; Scott v. Nichols, 61 Am. Dec. 503, and authorities referred to in the note. When a note payable by instalments is paid by a surety, the statute begins to run against him from the time he pays each instalment. Bullock v. Campbell, 9 Gill 182. It seems to be clearly established that, where a surety has paid more than his share of the debt, every such payment gives a right of action for contribution, and as a matter of course, the six years statute begins to run upon it.

But it is said the case comes within the ten years limitation provided for in subd. 4, § 4221, R. S. That, in effect, makes actions

cognizable in a court of chancery, where no other limitation is prescribed in the chapter, subject to that period of limitation. In answer to this suggestion, we observe that this is a plain action at law, in which a judgment for a specified sum is demanded. This is the only relief or matter asked for in the action. The statute in respect to a legal action applies to it. These statutes are clear and explicit, and bar an action founded upon an obligation or liability, express or implied, which is not brought within six years from the time the right of action accrues. It is said that a court of equity would take jurisdiction to enforce contribution, therefore the limitation of subd. 4, § 4221, applies. Whether this position is sound or not we shall not determine. It is sufficient now to say that this is not an equitable suit to enforce contribution, and no equitable relief is sought. It is a legal action to recover money paid to the use of the defendant and stands upon the same footing as any other action founded upon an implied contract.

The plaintiff paid the greater portion of the note, indeed, much more than his share. The principal debtor paid the plaintiff some money, and transferred to him some property. The court applied these several payments and the value of the property to reimburse the plaintiff for the excess he had paid more than his share. We see no error nor injustice in such an application The aggregate of these payments, increased by the value of the property, is much less than the amount the plaintiff has paid for his cosurety. It is therefore proper not to require the plaintiff to account for them under the circumstances.

It was also correct to give the plaintiff judgment for the amount of the last payment, for, as we have said, he had already paid largely in excess of his proportion, and, if the defendant pays the entire amount of the last payment made on the note, he will still fall short of paying his share of the debt. But there is an error in giving interest on the last payment exceeding seven per cent. Interest at ten per cent. was given, doubtless because the note drew interest at that rate. But the recovery is upon an implied contract for money paid to the defendant's use, and not upon the note nor upon the guardian's bond. The note and bond are paid and extinguished. The rate of interest on the amount of the recovery should be the legal rate, and no more. The counsel for defendant claims that there was not $98 due on the note when the last payment was made. We have made no computation, and shall not. The plaintiff is entitled to recover only what was due when the note was discharged, with legal interest on the same. The circuit court will enter judgment for the proper amount, as indicated in this opinion.

Accord: Neilson & Churchill v. Fry, 16 Ohio St. 552, 91 Am. Dec. 110.

SECTION 4. EQUITABLE CONTRIBUTION BEFORE PAYMENT

WOLMERSHAUSEN v. GULLICK

L. R. 2 Ch. Div. 514 (1893).

The plaintiff was the widow and executrix of George Wolmershausen, whose estate was being administered by the court, and this action was brought by leave of the court against Thomas Gullick and John Patton as cosureties with the deceased for contribution. In 1871 Wolmershausen, Gullick and Patton were directors of the original Hartlepool Colleries Company, Limited, which became insolvent, and was afterward wound up. In July, 1871, the company borrowed from its bankers, Messrs. Barclay, Bevan & Co., £25,000, and on the 29th of July, Wolmershausen, Gullick and Patton, and two other directors, who subsequently became insolvent, gave to the bankers a joint and several promissory note for the amount of the loan as sureties for the company. On the 21st of January, 1874, these five directors, as such sureties, gave a further joint and several promissory note to the bankers for £10,000. Wolmershausen died in May, 1879, and an action for the administration of his estate was commenced in the following July. In October, 1879, the bankers gave notice of a claim against the estate of the deceased for £6,000, the balance alleged to be due to them upon the two promissory notes after allowing payments to the extent of £23,500 and £5,500 on the said two notes respectively. The plaintiff resisted the claim, and applied for leave to bring in the cosureties under the third party procedure; but the application was refused, and there was no evidence that the defendants had any notice of it. The claim was finally adjudicated upon on the 26th of March, 1890, by Mr. Justice Stirling. His Lordship disallowed the claim to the extent of £1,500, the balance alleged to be due on the first note, but allowed it to the extent of £4,500, the balance on the second note, with interest, after deducting therefrom a sum of £70 as the estimated amount which the bankers might have recovered from the trustee in bankruptcy of another cosurety. The plaintiff had not as yet paid any part of this sum. The plaintiff claimed a declaration that the defendants were jointly and severally liable to contribute with the plaintiff to the discharge of the principal debt, and an order upon the defendants respectively to contribute with the plaintiff to pay to Messrs. Barclay, Bevan & Co. the amount of their debt, or, in the alternative, an order upon them to indemnify the plaintiff against any sums which she might pay to Messrs. Barclay, Bevan & Co. in excess of her proper share. The defend-

ant Gullick pleaded that the action was not maintainable, as the plaintiff has not paid anything in respect of the debt. The defendant Patton pleaded that in 1887 he had entered into a scheme of arrangement with his creditors under the Bankruptcy Act, 1883, and that under that scheme 20s. in the pound had been paid to all creditors who had proved their debts, and that such scheme was a bar to the plaintiff's claim. No claim was made under the bankruptcy proceedings against the debtor in respect of his unascertained liability to contribution, nor was such liability included by the debtor in his statement of liabilities. The defendants also pleaded the Statute of Limitations.

Wright, J.: This case raises an important question with respect to which there is a remarkable absence of express authority. The plaintiff is the executrix of a person who became surety with four others for a large sum of money advanced by a bank to a company. The surety's estate is being administered in the court, and the bankers put in a claim as creditors for the whole amount of the guarantee. The plaintiff resisted the claim and succeeded in reducing it from £6,000, but it has been finally allowed for a sum of about £4,500. The plaintiff is now called upon to pay that sum, and brings this action against cosureties for contribution. The plaintiff has not yet paid anything. One defendant I have dismissed from the action on the ground that he is discharged by a composition under section 18 of the Bankruptcy Act, 1883, inasmuch as it appears to me that his liability to contribute, although not ascertained at the time of the bankruptcy proceedings, nor included in his schedule of liabilities or in the claims or proofs, and not a debt in which respect of which an adjudication of bankruptcy could have been sustained, was a liability within the meaning of section 37 of the act, therefore a debt provable in the bankruptcy: Hardy v. Fothergill (4), 13 App. Cas. 351.

The principal defense of the other defendant is that the plaintiff is not entitled to maintain this action until she has paid more than her proportion, or at any rate until she has paid her proportion. The plaintiff is willing to pay her proportion, but she insists that the actual payment of it is not a condition precedent to her right to sue, and says that at any rate she is not obliged to pay the whole in the first instance and then sue for reimbursement. If she is obliged to pay the whole before actual contribution from the cosurety, the business in which the testator's assets are invested will be embarrassed by the withdrawal of so much of the capital even for a short time. Obviously if a man were surety with nine others for £10,000, it might be a ruinous hardship if he were compelled to raise the whole £10,000 at once and perhaps to pay interest on the £9,000 until he could recover the £9,000 by actions or debtor summonses against his cosureties.

The questions are whether the action can be maintained, and

what is the precise extent of the relief (if any) which can be given. By the Roman Law as it stood in the time of Justinian, sureties had, generally speaking, a right to compel the creditor to enforce payment against them pro rata only. The superior courts of common law in this country have never entertained any action for contribution by a surety against his cosurety, except the action for money paid, and from the time of Davies v. Humphreys, 6 M. & 153, which was decided in the year 1840, it has been treated as settled law that the surety can not maintain this action until he has actually paid more than his own proportion, because the action assumes a debt due and payable, and the creditor may yet enforce payment of the whole balance from the cosurety. Nor did the court of common law ever give in the case of cosureties the equitable relief which they were accustomed to give in many other cases of joint or common liability, by compelling contribution after judgment and before execution by means of a writ of audita querela or scire facias to limit the creditor's execution to the proper share payable by the particular defendant. This will be seen from the collection of ancient cases in 3 Rep., pages 12 and following.

By the custom of the city of London an equitable action lay in the city courts by a surety before he had paid anything to have it ordered that he and his cosureties should be charged pro rata only —"ut uterque eorum oneretur pro rata;" Offley and Johnson's Case, 2 Leon. 168, (26 Eliz).

In the earliest reports and abridgments of cases in Chancery, there is frequent mention of contribution, but there seems to be no reported instance of contribution between sureties before the 17th century, and even in modern times there is very little express authority that the surety has any remedy until he has actually paid too much, and still less authority to show the precise extent of the relief to which he may be entitled before such payment. In nearly every reported case the surety had before action paid more than his share. Nearly every case and text-book refers to his right to contribution as the right of a surety who has paid more than his proportion. In a few cases the ambiguous expression is used, "when he is called upon to pay more than his proportion."

The following are, I believe, the only reported cases which throw any light on the subject. I begin with two, which are not cases of suretyship, but which illustrate a principle of equity apparently established in other cases of contribution and applicable to this. (They are cited in Vin. Abr., tit. Contribution, from Cary's Reports).

"(27.) If a man grants a rent-charge out of all his lands, afterward sells his lands by parcels to divers persons, and the grantee of the rent will from time to time levy the whole rent upon one of the purchasers only, he shall be eased in chancery by a contribution

from the rest of the purchasers, and the grantee shall be restrained by order to charge the same upon him only."

"(28.) Sir Edmund Morgan married the widow of Fortescue, he had his wife's lands distrained alone by the grantee of a rent charge from her former husband, and therefore sued the grantee in chancery, to take a ratable part of the rent, according to the lands he held subject to the distress, and notwithstanding the Lord Chief Justice Popham's Report, who thought this reasonable, the Lord Chancellor Egerton would give him on this bill no relief, but ordered that he should exhibit his bill against the rest of the tenants and grantee both, the one to show cause why they should contribute, the other why he should not accept of the rent equally; otherwise it was no reason to take away the benefit of the distress from the grantee, which the law gave him."

Three cases of contribution between sureties in the time of Charles I are reported. In Peter v. Rich, 1 Ch. Rep. 34, the principle was established that in equity, if one of the several cosureties is insolvent, the others contribute as if he had not been a surety. There the plaintiff had paid the whole. In Morgan v. Seymour, Ibid. 120, the principle upon which the above cited cases from Cary, and the subsequent leading cases of Deering v. Earl of Winchelsea, 1 Coz. 318, 2 Bos. & P. 270, was decided seems to be applied in the fullest extent to the case of cosureties, the principal creditor being made a party to the suit, and the cosurety being ordered to pay direct to the creditor. The report is as follows:

"The plaintiff with Sir Edward Seymour, the defendant, being bound with Sir William St. Johns for the proper debt of the said St. Johns, to the defendant Rowland in a bond of £200 for the payment of £100, and the said Rowland sued the plaintiff only on the said bond, the plaintiff seeks to have the said Seymour contribute and pay his part of the said debt and damages, the said St. Johns being insolvent. This court was of opinion, that the said Seymour ought to contribute and pay one moiety to the said Rowland, and decreed Rowland to assign over the said bond to the plaintiff and Seymour, to help themselves against the said St. Johns for the said debt."

In Swain v. Wall, 1 Ch. Rep. 150, the plaintiff surety had paid the whole of the creditor's demand, and the only point decided was that his claim for contribution might be controlled by express contract. In Hale v. Harrison (1673), 1 Ch. Ca. 246, Finch 15, 203, the rule in Peter v. Rich was followed. In 1786, in Lawson v. Wright, 1 Cox 275, the plaintiff cosurety had paid off the whole liability, and he sued for contribution. Sir Lloyd Kenyon said that it had been established ever since the origin of the courts of Equity that one surety had a right to call upon another for contribution in cases of this nature. The only question was whether proof of payment by the surety was enough without proof that the principal

debtor was insolvent. The arguments seem to show that counsel and the court thought that an action could be maintained by a surety before he had paid anything, if he could prove the principal debtor to be insolvent. In 1787 the leading case of Deering v. Earl of Winchelsea, 1 Cox 318, 2 Bos. & P. 270, was decided in the Exchequer as a Court of Equity by Lord Chief Baron Eyre. There a surety by bond for £4,000 to the Crown had had judgment against him at the suit of the Crown for nearly the whole amount, and he filed his bill for contribution against sureties bound by distinct bonds to the same creditor to secure the same liability of the same debtor, and the only point reported as argued or decided was whether there should be contribution between sureties bound under distinct contracts of suretyship without privity of contract between themselves. After deciding that the right to contribution depends primarily, not upon contract, but upon the equitable principle that "in equali jure the law requires equality—the charging one surety discharges the other, and each ought therefore to contribute to the onus," the court proceeded to declare the plaintiff's right to contribution, and ordered the other sureties to pay their share to the creditor. No similar order is to be found in any other case of sureties except Morgan v. Seymour, 1 Ch. Rep. 120. But it is in strict accordance with the principle of the cases cited from Cary, and it is hardly possible to suppose that so obvious and important a matter as the jurisdiction to make such an order could have been overlooked. It appears, from the report of the case in 2 Bos. and P., though not from the report in 1 Cox, that the Crown as creditor was made a defendant to the bill under the name of the Attorney-General; and there could not have been any object in this except that the Crown should be controlled and prevented from enforcing its legal right inequitably against one alone of the sureties. That nothing so important was overlooked may be inferred from the remarkable observations of Lord Eldon, who had himself argued the case, and who said, in Craythorne v. Swinburne (1807), 14 Ves. 160:

"In the case of Deering v. Earl of Winchelsea, 1 Cox 318, 2 Bos. & P. 270, which, I recollect, was argued with great perseverance * * * it is decided that, whether they are bound by several instruments, or not, whether the fact is or is not known, whether the number is more or less, the principle of equity operates in both cases; upon the maxim, that equality is equity: the creditor who can call upon all, shall not be at liberty to fix one with payment of the whole debt; and upon the principle, requiring him to do justice, if he will not, the court will do it for him. * * * I argued that case; and was much dissatisfied with the whole proceeding, and with the judgment; but I have been since convinced, that the decision was upon right principles. Lord Chief Justice Eyre in that case decided, that this obligation of cosureties is not founded in contract,

but stands upon a principle of equity; and Sir S. Romilly has very ably put, what is consistent with every idea, that, after that principle of equity has been universally acknowledged, then persons, acting under circumstances to which it applies, may properly be said to act under the head of contract, implied from the universality of that principle. Upon that ground stands the jurisdiction assumed by courts of law. * * * The doctrine of contribution * * * stands upon this; that all sureties are equally liable to the creditor; and it does not rest with him to determine upon which the burden shall be thrown exclusively; that equality is equity; and if he will not make them contribute equally, this court will finally, by arrangement, secure that object."

Several other cases of contribution between sureties occur in the books in Lord Eldon's time, but in none of them is there any reference to the point in question. In Ex parte Gifford (1802), 6 Ves. 805, 808, Lord Eldon said:

"The principal is to discharge all the obligations of all the sureties; but they stand with regard to each other in a relation, which gives rise to this right among others; that, if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion, which in all events he is to pay."

In Craythorne v. Swinburne, 14 Ves. 160, already cited, Lord Eldon states the right of the surety in these terms: "It has been long settled, that, if there are cosureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this court, either upon a principle of equity, or upon contract, to call upon his cosurety for contribution."

In Antrobus v. Davidson (1817), 3 Mer. 569, it was held that the creditor can not bring an action quia timet against a surety to force him to set apart money to provide for the possibility of a debt becoming due from the principal debtor.

In 1821, in Stirling v. Forrester, 3 Bli. 575, 590, 596, in the House of Lords, Lord Redesdale said: "The principle established in the case of Deering v. Earl of Winchelsea, 1 Cox 318, 2 Bos. & P. 270, is universal, that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, and by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of decision in Deering v. Lord Win-

chelsea. * * * The question depends upon equity, not upon contract; and in this case a contract is to be implied. The decision in Deering v. Lord Winchelsea proceeded on a principle of law which must exist in all countries, that where several persons are debtors, all shall be equal."

In 1861, in Reynolds v. Wheeler, 30 L. J. (C. P.) 350, 10 C. B. (N. S.) 561, which was an action for money paid, Earle, C. J., said: "If one surety is called on to pay the whole debt he is entitled to have contribution from his cosurety," and Williams, J., said: "It is now well established by many cases that where two parties stand in the relation of cosureties, and one of them is applied to for more than his share, he is entitled to call upon his companion for reimbursement." But having regard to the common law, as settled by Davies v. Humphreys, 6 M. & W. 153, it seems plain that these expressions must be understood as assuming actual payment by the plaintiff of more than his share.

In 1868, in Wooldridge v. Norris, Law Rep. 6 Eq. 410, executors of a surety obtained an order for indemnity and payment by a person who had covenanted to indemnify the testator against his liability as surety, although the executors had not paid or been sued. The judgment, however, proceeded on the particular terms of the covenant.

In the same year, in Cruse v. Paine, Law Rep. 6 Eq. 641, 4 Ch. 441, Vol II, 1893, where a vendor of shares was entitled to be indemnified by his vendee against calls, Lord Hatterly declared the liability of the vendee for future calls, and ordered him to indemnify the vendor's estate, and to procure its release or discharge "either by payment of the calls or otherwise, with liberty to apply in Chambers, &c."

In 1872, in Bechervaise v. Lewis, Law. Rep. 7 C. P. 372, 377, Willes, J., said: "The surety, * * * as soon as his obligation to pay becomes absolute, has a right in equity to be exonerated by his principal."

In 1874, in Lacey v. Hill, Ibid. 18 Eq. 182, 191, upon a creditor's claim in an administration, Jessel, M. R., said:

"Whatsoever may be the case at law * * * it is quite plain that in this court any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him."

In 1877, in Lloyd v. Dimmack, 7 Ch. D. 398, Mr. Justice Fry refused to declare prospectively the right of the assignor of a long lease to indemnity against future breaches of covenant by the assignee, and in Hughes-Hallett v. Indian Mammoth Gold Mines

Company, 22 Ch. D. 561, 565, the same learned judge refused to make as order quia timet against a person for whom the plaintiff held shares to indemnify the plaintiff, there being no evidence that calls were likely to be made, but said: "There have been undoubtedly, cases in which, where a contract for indemnity existed, and a right to sue upon that contract had arisen, the court has declared the right to indemnity generally, and has put matters in such a train that, when the subsequent right to indemnity should arise, the indemnity might be worked out. Some forms of judgments in that class of cases are to be found in the last edition of Seton on Decrees, and they show that where a person has taken shares for another, and a call has been made which has not been met by the person liable to pay it, the trustee who is entitled to an indemnity may obtain a declaration of his title generally, and may possibly obtain liberty to apply from time to time to work it out." So, in the similar case of Hobbs v. Wayet, 36 Ch. D. 256, where a call on shares was also threatened, Mr. Justice Kekewich made a declaration of the right of indemnity.

The preceding cases from Cruse v. Paine, Law Rep. 6 Eq. 641, 4 Ch. 441, downwards have been referred to, not as having any direct bearing on the rights of cosureties, but as throwing some light on the nature and extent of the relief which can be given in equity in analogous matters. There are only two remaining authorities. In 1881, in Ex parte Snowdon, 17 Ch. D. 44, 46, 47, a surety who had paid his own share and no more, and who had not been called upon to pay more, issued a debtor's summons against his cosurety for half of what had been paid, and he obtained an adjudication of bankruptcy, which the Court of Appeals annulled on the ground that, until a surety had paid more than his share, there is no legal or equitable debt to sustain bankruptcy proceedings. Lord Justice James is reported to have said: "I think your proper remedy is to call on Snowden to pay the bank £541. * * * I believe the proper course when a surety is called upon to pay a part of the whole debt for which he is liable would be to bring an action against his cosureties to compel them to contribute to pay the debt to the creditor, just as he would be entitled to call on them for contribution if he had been sued by the creditor, asking that he should be indemnified by his cosureties against paying the whole debt, or whatever risk he ran." The report in the Law Journal, 50 L. J. (Ch.) 540, 541, is as follows: "The proper course when a surety is called upon to pay the whole debt, for which he is liable with his cosurety, is to call upon his cosurety for contribution and to indemnify him against paying the whole; and the only mode in which in equity you can compel a cosurety to pay his proportion of the debt is to show that you have paid your proportion, or more than your proportion, of the debt, and are liable for the residue." In the Weekly Reporter, 29 W. R. 654, it is, "The proper course

where a surety is called upon to pay the whole debt for which he is liable would be to call upon his cosureties for contribution, just as he would be entitled to have done if a bill had been filed against him by the principal creditor, asking that he should be indemnified against paying the whole." In 1883, in Macdonald v. Whitfield, 8 App. Cas. 733, 750, Lord Watson, pro cur., declared the right to contribution, of a surety who had not paid, but had had judgment against him, in this form: "Entitled and liable to equal contribution inter se." In Lord Justice Lindley's work on Partnership, 5th ed., p. 374, it is observed that "before the passing of the Jurisdicture Acts, a right of contribution or indemnity, arising otherwise than by special agreement, was only enforcible at law by a person who could prove that he had already sustained a loss. But in equity it was very reasonably held, that even in the absence of any special agreement, a person who was entitled to contribution or indemnity from another could enforce his right before he had sustained actual loss, provided loss was imminent; and this principle will now prevail in all divisions of the High Court. Therefore a person who is entitled to be thus indemnified against loss is not obliged to wait until he has suffered, and perhaps been ruined, before having recourse to judicial aid. Thus, in the ordinary case of principal and surety, as soon as the creditor has acquired a right to immediate payment from the surety, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation; and when one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually been dannified; and the limit of the defendant's liability to the plaintiff is the full amount for which he is liable; or if he is dead or insolvent the full amount provable against his estate, and not only the amount of dividend which such estate can pay. In strict conformity with these principles, partners and directors who are individually liable to be sued on bonds and notes, which as between them and their copartners are to be regarded as the bonds and notes of the firm or company, are entitled to call for contribution before these bonds or notes have been actually paid. So a trustee of shares liable to calls is entitled to be indemnified by his cestui que trust against them before they are paid." This statement of the law is an authority in favour of the view that some relief can be given, but it does not specify the form or limit of the relief; nor do any of the authorities cited in the notes throw any further light on the matter. Nor have I been able to obtain assistance from American or English writers on equity or on the law of suretyship. The plaintiff's difficulties have been increased by this, that an application by her for leave to use the third party procedure ordinarily applicable in cases of contribution or indemnity was refused in the administration action, on the ground that the procedure is not available in an ad-

ministration action. And even if the question had arisen upon a third party procedure, nearly the same difficulties would have occurred.

In this state of the authorities I think that, if the plaintiff had made the creditor a defendant to the present action, I ought to have held that the allowance of the principal creditor's claim in the administration action was equivalent to a judgment against the plaintiff for the whole amount of the guarantee, and that on the precedents of Morgan v. Seymour, 1 Ch. Rep. 120, and Deering v. Earl of Winchelsea, 1 Cox 318, 2 Bos. & P. 270 (Vol. II, 1893), the plaintiff would have been entitled to a declaration of her right to contribution and to an order upon the solvent cosurety to pay his proportion to the principal creditor. The principal creditor not being a party, I think that I can not order payment to him or directly prevent him from enforcing his judgment against the plaintiff alone. Nor can I at present order the cosurety to pay his half to the plaintiff, for the plaintiff can not give him a discharge as against the principal creditor, and this case is not like the case of a plaintiff who merely claims indemnity, as in the cases referred to by Jessel, M. R., in Lacey v. Hill, Law Rep. 18 Eq. 182, 191, in which no question arises as to any other party. But I think that I can declare the plaintiff's right, and make a prospective order under which (whenever she has paid any sum beyond her share) she can get it back, and I therefore declare the plaintiff's right to contribution, and direct that, upon the plaintiff paying her own share, the defendant Gullick is to indemnify her against further payment or liability, and is, by payment to her or to the principal creditor or otherwise, to exonerate the plaintiff from liability beyond the extent of her own share. The plaintiff must have liberty to apply in Chambers and generally to apply.

See also Ferrer v. Barrett, 57 N. Car. 455; Hodgson v. Baldwin, 65 Ill. 532.

SECTION 5. AMOUNT RECOVERABLE

STALLWORTH *v.* PRESLAR

34 *Ala.* 505 (1859).

STONE, J.: When two or more persons jointly become sureties for another, on a note for the payment of money, each surety becomes liable to the other to pay his share of the liability, in the event the principal fails to do so. Pait v. Pait, 19 Ala. 713; White v. Banks, 21 Ala. 705; Taylor v. Morrison, 26 Ala. 728; Martin v. Baldwin, 7 Ala. 923.

In such case, if the principal fails to pay, and one of several

sureties is forced by suit to pay the debt, there accrues to the surety so paying at the time of the payment, a right of action against his cosurety for contribution. The surety sued need not wait until the money is forced out of him by execution. He may pay as soon as judgment is recovered against him, or his liability otherwise fixed and matured, and does not thereby forfeit his right to contribution from his cosureties. Money thus paid is, to the extent of the liability of the cosurety to contribute, considered at law as paid at the special instance and request of the cosurety; and at that precise time, the cause of action to recover on such implied promise accrues, without reference to the time when the original contract matured. Knox v. Abercombie, 11 Ala. 997; Broughton v. Robinson, 11 Ala. 922; Roberts v. Adams, 6 Por. 361; Young v. Clark, 2 Ala. 264; May v. Long, 6 Ala. 107; Martin v. Baldwin, 7 Ala. 923; Jones v. Lightfoot, 10 Ala. 18; Hooks v. Br. B'k Mobile, 8 Ala. 580; Crouch v. Terry, 12 Ala. 225; Pearson v. Gayle, 11 Ala. 278; 1 Parsons on Contracts, 32 to 37.

The fact that Mr. Stallworth, for the sum of $1,000, discharged the debt for which he and Mr. Preslar were liable as sureties, can have no effect on the rights of the parties, farther than to reduce the amount of the latter's liability. In this class of cases, equality is equity; and the debt having been, as it is contended, discharged by the payment of $1,000, Mr. Preslar is only liable to contribute his proportion of that sum, with interest from the time of payment. Steele v. Mealing, 24 Ala. 286; Br. Bank of Mobile v. Robertson, 19 Ala. 798; Cullum v. Br. Bank of Mobile, 23 Ala. 797; Martin v. Baldwin, 7 Ala. 923; Pinkston v. Taliaferro, 9 Ala. 547; Bizzel v. White, 13 Ala. 422. It may, without affecting the result of this case, be conceded, that unless the plaintiff can show that he has paid a greater sum than the defendant remains liable to pay, he can not maintain this action. See Ex parte Gifford, 6 Vesey 805. If, however, the entire liability is discharged—canceled—against both sureties, then the plaintiff has paid a greater sum than the defendant can ever be required to pay to the creditor, for he can never be required to pay anything to him. In such case, if he is not liable to his cosurety, he is liable to no one. The result of the rule contended for would be, to give him the benefit of the plaintiff's bargain, without imposing on him any of its burdens. Suppose the compromise, or accord and satisfaction, had proceeded on the terms of the payment by Stallworth of one-half the liability, and for that consideration the creditor had canceled the entire liability as against all the obligors. Is it not manifest that, under such a rule, Preslar would become the recipient of all the benefits of Stallworth's bargain? This could not be equity, because it is not equality. Under well defined rules, Stallworth, at the time he made the payment, had the clear right to pay the entire debt, and then to

recover one moiety thereof from Preslar. To hold that, because he secured better terms than the law required he should demand, he thereby forfeited his right to contribution, would lead to the most shocking injustice.

Another view of this question: Suppose Mr. Stallworth had paid to Halsey, Utter & Co. their entire demand, and had subsequently received from Watts, his principal, indemnity for one-half the amount; or suppose an execution, issued upon the judgment, had been levied, as to half the amount, of the goods of Watts; and he, Watts, having no other effects, the remaining half had been paid by Stallworth. If, in the case first supposed, Stallworth had sued Preslar for contribution, the latter could claim an equal benefit in the indemnity furnished by Watts, their common principal. Bizzel v. White, 13 Ala. 422; Pinkston v. Talliaferro, 9 Ala. 547. Being, under this rule, entitled to share in all the advantages secured by his cosurety's diligence, he must, to the extent of his share of the mutual liability, contribute to the burdens which that liability imposes.

These rules show clearly that the circuit court erred in sustaining defendant's demurrer to the first count of the complaint.

Under the rules above declared, the plaintiff's right to recover in this action, depends on the fact that he and the defendant were cosureties of Mr. Watts, their common principal; and that after default by the principal, the plaintiff had paid more than his pro rata share of the liability. This, we have seen, does not render it necessary that he shall have paid more than one-half of the original liability, provided the debt to the creditors had been extinguished as against all the obligors. Proof, then, of these facts, makes a prima facie case for recovery. Any testimony which legitimately tends to establish either one of these facts, is legal and competent, and should not be rejected.

Note: The value of property turned over by a surety in discharge of the debt is the basis of calculation for contribution from cosureties. Jones v. Bradford, 25 Ind. 305; Elliott v. Mitchell, 47 Tex. 445.

VAN WINKLE *v.* JOHNSON

11 *Ore.* 469, 5 *Pac.* 922, 50 *Am. Rep.* 495 (1885).

By the court, LORD, J.: The plaintiff and the defendant were sureties on a promissory note executed by one James Johnson to the First National Bank at Walla Walla. James Johnson died insolvent. After the note became due, the defendant called upon the payee, and expressed his willingness to pay his part or share of the note, but he did not pay, nor offer to pay the same. He also made

some effort to notify the plaintiff of his readiness to make such payment of his aliquot part, but the information was never communicated to the plaintiff. Subsequently, the holder and payee of the note brought an action to enforce its collection, but the defendant was not served with process. After the action was commenced, but before judgment was recovered, the defendant paid to the bank his moiety of the note. Thereafter, a judgment was recovered against the plaintiff for the balance due upon the note, including costs, and a certain sum adjudged reasonable as attorney's fees, as stipulated in the note. This suit is brought to compel the defendant to contribute his share or moiety in payment of such costs and attorney's fee. The defendant insists that he is not liable for the reason that he has paid his part, and that the additional expense incurred as incidents of the action was due to the default and negligence of the plaintiff. The right to contribution is based upon the maxim, "equality is equity." Originally, it was enforced only in equity and on principles of natural justice. The right to it did not depend upon contract, but sprung from equitable considerations arising out of the relation of the parties to each other, and the fact of a common interest and a common burden to bear. "The right to contribution," says Church, C. J., "between cosureties depends upon principles of equity rather than upon contract. It is well settled that the liability exists, although the sureties are ignorant of each other's engagement. The equity springs out of the proposition that when two or more sureties stand in the same relation to a principal, they are entitled equally to all the benefits and must bear equally all the burdens of the position. In such case the maxim 'equality is equity' applies." (Wells v. Miller, 66 N. Y. 258.) Although the obligation of cosureties to contribute to each other is not founded upon contract, or any notion of an implied promise, yet the doctrine of contribution as applied and administered in equity has stood so long and been so universally recognized that a jurisdiction at law has grown up and become well settled. (3 Pom. Eq. Jur., § 1418, note; Brant on Suretyship and Guaranty, § 220.) When, therefore, two or more persons jointly become sureties for another on a note for the payment of money, each surety becomes liable to the other to pay his share of the liability in the event of the failure or insolvency of the principal. "By becoming sureties," said Appleton, C. J., "each impliedly promised the other that he would faithfully perform his part of the contract, and pay his proportion of the loss in case of the insolvency of the principal." (Hichborn v. Fletcher, 66 Maine 210.) He is not obliged to delay payment until suit is brought. His liability accrues upon the maturity and nonpayment of the note for which he is surety. If, however, it is not paid, and a judgment is recovered against the principal and his sureties, or against the sureties alone, and one of them pays it, he can recover one-half of the costs of the suit from

his cosurety. (Davis v. Emerson, 17 Maine 64; Newcomb v. Gibson, 127 Mass. 398.) In the former of these last cases, the court say: "The failure to pay which occasioned the costs was imputable to the defendant as much as the plaintiff. The plaintiff paid the execution including the costs. The costs can not be distinguished from the debt. Every equitable principle which entitled the plaintiff to contribution for the one, applies equally to the other." In such cases, where the costs are recovered in a judgment against them jointly, it is clear, then, the costs have become a common burden, and each may recover of the other for the payment of more than his proportion. And it has been further held that a surety may not only recover of his cosurety a proportionate share of his costs, but also the expenses incurred in defending a suit where the defense set up was reasonable, hopeful and prudent. (Fletcher v. Jackson, 23 Vt. 593; Marsh v. Harrington, 18 Vt. 150.) As an incident of the common burden after suit brought, and when both are in default of payment, the liability for contribution for acts is founded upon the same equitable principle as is applied to the main obligation. In Briggs v. Boyd, 37 Vt. 520, the court says: "But this was a debt for which the plaintiff and defendant were jointly liable. Briggs was no more bound to pay the whole of it than Boyd. As between themselves each was to pay one-half. Had Boyd paid his half or offered to pay it before suit, there would be ground for his saying that he ought not to contribute to the costs. But the costs were made in collecting the whole of the note from Briggs. As one appears to have been just as much in fault as the other in not paying the note, which led to the necessity of making the costs, we think they should bear equally the burden of the costs." Now what are the facts, in the case before us. Both the plaintiff and the defendant were in default of payment before the action was brought on the note. As between themselves each was liable for his share, but neither paid his part or any portion of it before the action was commenced. It is true that the defendant had expressed a willingness to liquidate his share to the payee, but he did not pay it, or offer to pay it. It is true, too, he sent word to the plaintiff that he was willing to pay his share, but the message was never communicated to the plaintiff. As was said in Boyd v. Briggs, supra, had he "paid his half or offered to pay it before suit was brought, there would be ground for his saying that he ought not to contribute to the costs." Mere willingness, unaccompanied by any offer, is not sufficient. Had he tendered to the plaintiff an offer to pay his part and the plaintiff had refused or delayed in the acceptance of such offer, the case would stand different. It is clear that neither had any defense to the note; and whenever an action should be brought, the judgment with its incident was inevitable. The fact that the defendant was not served with process is not material. So far as payment is concerned, they

were equally in fault, and neither had done such things with respect to the other that would furnish any just reason for exoneration from liability. Suits for contribution against a cosurety for costs, like many other suits in equity, depend very much upon the particular facts of each case. Considerations of right and justice as applicable to the facts are the controlling principle in determining the result. Upon the facts as presented by this record, we are of the opinion the defendant is liable for his proportionate share of the costs, and a decree must be entered accordingly.

Accord: Gross v. Davis, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. 635; Bright v. Lennon, 83 N. Car. 183; Davis v. Emerson, 17 Maine 64.

MICHAEL *v.* ALBRIGHT

126 *Ind.* 172, 25 *N. E.* 902 (1890).

Coffey, J.: This was an action by the appellant against the appellee for contribution. The complaint alleges, among other things, that on the 1st day of November, 1884, Enos Michael, Phillip J. Michael, Jacob K. Fox, Jacob E. Michael, and the appellant and the appellee, executed to John A. Thorp their promissory note for the sum of $1,700; that Enos Michael was the principal in said note, and the other makers were sureties thereon; that after said note became due, the appellant paid the same, which then amounted to the sum of $1,900; that at the time appellant paid said note the principal, and all the other parties thereto, except the appellant and the appellee, then were, and ever since have been, wholly insolvent, and had not then, nor have they since had, any property subject to execution; that the appellee is indebted to the appellant by way of contribution, in the sum of $1,000.

Upon issue joined the cause was tried by a jury, resulting in a verdict for the appellee, upon which the court, over a motion for a new trial, rendered judgment.

At the proper time the appellant entered his objection to the trial of the cause by a jury, and prayed that the same might be tried by the court, but the court overruled his objection, and he excepted.

The only questions presented for our consideration relate to the action of the court in submitting the cause to the jury, and in overruling appellant's motion for a new trial.

The first contention of the appellant is that the cause was one of exclusive equitable jurisdiction, and that by reason of the provisions of section 409, R. S. 1881, it was triable by the court, and not by jury.

Section 409, supra, provides that "Issues of law and issues of fact

in causes that, prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court."

In the case of Judah v. Mieure, 5 Blackf. 171, it was held by this court that an action for contribution might be maintained in a court of law; and in the case of Sanders v. Weelburg, 107 Ind. 266, it was held that such an action was properly triable by jury.

It is conceded by the appellant that if the present suit was an ordinary action for contribution it would not be exclusively within the jurisdiction of a court of equity, but he contends that the allegations in the complaint to the effect that some of the sureties are insolvent gives it the character of a cause of exclusive equitable cognizance.

It can not be successfully disputed that the courts of law have always assumed jurisdiction in actions for contribution, though it has sometimes been held that a plaintiff in an action at law could not recover more than an aliquot part of the whole sum paid in discharge of the debt. But the question as to the extent of the relief granted is not the test as to whether a cause belongs exclusively to a court of equity; but the question is, will a court of law take jurisdiction? If a court of law will take jurisdiction and grant some relief, then the cause does not belong exclusively to the courts of equity.

The better opinion, however, seems to be that courts of law will not only take jurisdiction of the kind of action now before it, but that they will grant full relief, and where one or more of the sureties are insolvent they will divide and apportion the amount paid among those who are solvent. Henderson v. McDuffee, 5 N. H. 38; Mills v. Hyde, 19 Vt. 59.

Our opinion is that the cause before us was not one of exclusive equitable jurisdiction prior to the 18th day of June, 1852, and that the court did not err in awarding to the appellee a jury trial.

The remaining question in the case relates to the sufficiency of the evidence to sustain the verdict.

The evidence in the cause is quite voluminous, but we have given it a careful examination. While it is not as satisfactory as could be desired, we are not able to say that there is no evidence in the record warranting the conclusion reached by the jury. We can not disturb the verdict on the evidence.

Judgment affirmed.

In the early cases the rule was that in an action at law the share of an insolvent surety was not borne by all, but in equity it was. See Browne v. Lee, 6 B. & C. 689; Cowell v. Edwards, 2 B. & P. 268; Hole v. Harrison, 1 Chanc. Cas. 246.

The absence of one cosurety from the state has the same effect as if he were insolvent. Liddell v. Wiswell, 59 Vt. 365, 8 Atl. 680.

SECTION 6. RELEASE OF COSURETY

GEORGE H. SMITH, JACOB WISNER ET AL. *v.* STATE OF MARYLAND, USE OF THE COUNTY COMMISSIONERS OF BALTIMORE COUNTY

46 *Md.* 617 (1877).

ROBINSON, J., delivered the opinion of the court.

This is a motion to quash an execution issued on a judgment, recovered by the appellee against the appellants and Mary Payne, executrix of B. N. Payne, sureties on the bond of Nelson Cooper, one of the tax collectors of Baltimore county.

At the request of one of the heirs-at-law of Payne a statement was made, showing the ratable proportion due by each defendant in the judgment, and, upon the payment of Payne's proportion as thus ascertained, the appellee directed the clerk to enter the judgment satisfied as against his executrix.

The appellants contend that, being cosureties, the entry of satisfaction as against the executrix of Payne discharges them from all liability on account of said judgment. Now, it is true that any valid contract or agreement between the creditor and the principal, or between the creditor and a surety, without the concurrence of cosureties, whereby the latter are subject to an increased risk, operates as a discharge of such sureties. And hence the release by a creditor of the principal, releases also the surety, because the latter is entitled, upon the payment of the debt, to be subrogated to all the rights and remedies of the creditor, and the creditor can not, by his own act, prejudice or in any manner impair these rights without forfeiting his remedy against the surety.

It seems also to be well settled that the release of one or more sureties without the assent of the cosureties will operate at law to discharge the latter, because it is a cardinal principle of suretyship that the surety has the right to stand by the very terms of the contract, and the creditor will not be permitted to change or alter the contract without concurrence of all the parties to it.

In equity, however, the rule is different, and the release of one or more sureties will not be construed to have this effect, unless it subjects the cosureties to an increased risk or liability.

Accordingly, it has been held that where the creditor releases one surety, reserving his remedy against the others, the effect of such release operates only to discharge the cosureties from the ratable proportion which the surety thus released ought to have contributed, and such further proportion as he ought to have borne arising from the insolvency of any of the other sureties.

It is difficult to imagine on what principle it can be maintained

in equity, that the mere release of one surety discharges the other sureties from liability.

As between themselves, the sureties are liable only for their proportion of the debt, and the right of contribution does not exist unless they have paid an amount exceeding their proportion.

If, then, the release of one surety discharges the others from the payment of the proportion of the debt, which such surety ought to have contributed, and discharges them also from the proportion which he ought to bear in the loss arising from the insolvency of any of the other sureties, it is clear that such release can in no manner prejudice or subject the cosureties to an increased risk. It follows then, from what we have said, that the payment of Payne's proportion of the judgment, and the subsequent entry of satisfaction as against his executors, could not in any manner affect the rights of the cosureties, or subject them to an increased liability. The effect of that entry so far as they are concerned, is to release them from the payment of Payne's proportion of the judgment, and should any of the cosureties prove insolvent, to release them from the payment of Payne's proportion of the loss arising from such insolvency.

In summary motions of this kind, courts always exercise a quasi equitable jurisdiction, and will not therefore order an execution to be quashed if it appears upon a consideration of all the facts and circumstances of the case it would be against well settled principles of equity.

For these reasons, the motion to quash the execution, and strike out the judgment, were properly overruled.

Judgment affirmed.

SECTION 7. SURETY SEEKING CONTRIBUTION MUST ACCOUNT FOR INDEMNITY GIVEN HIM BY PRINCIPAL

STEEL *v.* DIXON

17 *Ch. Div.* 825 (1881).

In October, 1878, William Robinson applied to his bankers for an advance of £800. The bankers consented to make the advance upon the security of a joint and several promissory note for £800 signed by Robinson and four sureties. Robinson applied to G. W. Dixon and Jason Gurney to become two of the sureties, and they consented to do so upon the terms of his securing them, by means of an assignment or transfer of sufficient property of his own, from any liability upon the note. The note was dated the 28th of October, 1878, and was signed by Dixon on the 27th of October,

and by Gurney on the 28th of October, and was payable on the 30th of April, 1879. Afterward Robinson procured T. A. Steel and W. Chater to act as the other sureties. Steel signed the note on the 15th of November, 1878, and Chater a day or two before. Neither Steel nor Chater when they signed the note had any knowledge of the agreement between Robinson and Dixon and Gurney that he should give them security. On the 24th of February, 1879, Robinson executed a bill of sale of his furniture to Dixon and Gurney as security for their liability on the note. The deed contained a power of sale, and it was declared that the grantees should apply the proceeds of sale in the first place in the payment of expenses, and in the second place in or toward payment of the share or shares of the moneys which should or might become payable upon or in respect of the promissory note, and which share or shares Dixon and Gurney should or might, as between themselves and Steel and Chater, be liable to pay or contribute in the event of default being made by Robinson in the payment of all or any part of the moneys due under the promissory note; and in the third place toward payment of the residue of the moneys which should or might become payable upon or in respect of the promissory note, and which residue Steel and Chater would upon default of Robinson be primarily liable to pay or contribute, but so that Steel and Chater or either of them should have no right or power to interfere or claim any benefit in the provisions of the security, and lastly to pay any surplus of the proceeds to Robinson. This deed was registered under the Bills of Sale Act. On the 18th of March, Robinson filed a liquidation petition. The promissory note was paid to the bankers at maturity by the four sureties, each of them contributing £200. Dixon and Gurney afterward sold the furniture comprised in the deed of the 24th of February, 1879, realizing thereby about £500. This action was brought by Steel and Chater against Dixon and Gurney, claiming a declaration that Dixon and Gurney were bound to account to the plaintiffs, as cosureties of the promissory note, for the sums received by them by the sale of the furniture; that no account might be taken of the moneys so received; and payment to each of the plaintiffs of one-fourth part of what should appear on the taking of the account to have been received by Dixon and Gurney.

The trustee in the liquidation of Robinson disputed the validity of the deed of the 24th of February, 1879, alleging that its execution by Robinson was an act of bankruptcy, and that it was void in toto, as against the trustee. The trustee was afterward made a defendant to the action, and he delivered a statement of defense. An order was subsequently made by Fry, J., on the application of Dixon and Gurney, giving them leave to serve a notice, under rule 17 of order XVI, of the Rules of Court, 1875, on the trustee, for the purpose of raising as between them and him the question of the

validity of the deed. A notice was accordingly served by Dixon and Gurney on the trustee, and he delivered a reply, alleging the total invalidity of the deed. The plaintiffs by their reply to the trustee's defense said that they did not claim any interest in the proceeds of sale of the furniture so far as those proceeds exceeded the £400 secured by the deed of the 24th of February, 1879, to Dixon and Gurney.

It was arranged that the question should first be tried whether assuming that the bill of sale created a valid security as between Robinson and his trustee and Dixon and Gurney for £400 in favor of Dixon and Gurney, but that it did not create any security in favor of Steel and Chater, Steel and Chater were as between themselves and Dixon and Gurney, entitled to share in the benefit of the security.

Fry, J., after stating the facts, continued:

The plaintiffs, by their reply to the trustee in the liquidation of Robinson, made no claim under the deed, except to the extent of the £400 which had been raised under it for the defendants Dixon and Gurney, and therefore the question on which I have now to express my opinion is this, assuming that the deed created a valid security in favor of Dixon and Gurney, must it not have created a like valid security in favor of the plaintiffs, and are not the plaintiffs, as between themselves and Dixon and Gurney, entitled to share in the security?

In my opinion the plaintiffs are entitled to share in the benefits secured by the deed to the defendants. In coming to that conclusion, I base myself on the general principle applicable to cosureties, as established by the well-known and often-cited case of Deering v. Earl of Winchelsea, the short effect of which I take to be that, as between cosureties, there is to be equality of the burden and of the benefit. When I say equality I do not mean necessarily equality in its simplest form, but has been sometimes called proportionable equality. The result of that case was expressed by Baron Alderson in Pendlebury v. Walker, 4 Y. & C. Ex., p. 441, in these terms, that "where the same default of the principal renders all the cosureties responsible, all are to contribute; and then the law superadds that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is a surety." I hold, therefore, that the result of Deering v. Earl of Winchelsea is to require that the ultimate burden, whatever it may be, is, as between the cosureties to be borne by them in proportion to the share of the debt for which they have made themselves responsible.

If that be the case, it follows that each surety must bring into hotchpot every benefit which he has received in respect of the suretyship which he undertook, and if he has received a benefit by

way of indemnity from the principal debtor, it appears to me that he is bound, as between himself and his cosureties, to bring that into hotchpot, in order that it may be ascertained what is the ultimate burden which the cosureties have to bear, so that that ultimate burden may be distributed between them, equally or proportionably, as the case may require.

In coming to that conclusion, as I do upon principle, I am much strengthened by the American authorities to which my attention has been called by Mr. Cookson. Mr. Justice Story, in his Equity Jurisprudence, asserts the principle in these terms: "Sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal, but they are also entitled to the benefit of all securities which have been taken by any one of them to indemnify himself against such liabilities." And in the case of Miller v. Sawyer, 30 Vt. 412, which was before the Court of Chancery in the state of Vermont, the principle is stated thus by Mr. Justice Barrett, the learned judge who delivered the judgment of the court. Having referred to Deering v. Earl of Winchelsea, he said: "For present purposes it is needless to cite and discuss the books and cases to any considerable extent, in which this subject is treated, and the leading principles of it applied in settling the rights and duties of parties. It may be comprehensively stated, that persons subject to a common burden stand in their relation to each other upon a common ground of interest and of right, and whatever relief, by way of indemnity, is furnished to either by him for whom the burden is assumed, inures equally to the relief of all the common associates;" and in the course of his judgment he refers, among other cases, to that of Hall v. Robinson, 8 Iredell 56, in which Chief Justice Ruffin said: "The relief between cosureties in equity proceeds upon the maxim that equality is equity, and that maxim is but a principle of the simplest natural justice. It is a plain corollary from it that, when two or more embark in the common risk of being sureties for another, and one of them subsequently obtains from the principal an indemnity or counter-security to any extent, it inures to the benefit of all. The risk and the relief ought to be coextensive." These American decisions are, it seems to me, exactly in point.

Mr. North has urged that a difference may arise where the security taken by one cosurety is taken by virtue of a bargain entered into between him and the principal debtor at the time of his becoming surety. In my judgment that is immaterial. I think it does not affect the principle of equity to which I have referred whether the security is the result of a contract with the debtor at the time when the cosurety becomes a surety, or is voluntarily given subsequently or arises in any other manner whatever, I repeat that whatever goes to diminish the total amount of the burden must, in my judgment, be brought into hotchpot.

In saying that, however, I wish to guard myself against its being supposed that this equity may not in any case be varied or departed from. Those to whose benefit the security inures may, of course, contract themselves out of the benefit, and the question may therefore well have to be considered in each case whether there has been such a contract between the cosureties. But a contract between one surety and the debtor is not to be confounded with a contract between the cosureties—a contract by which one cosurety renounces his equity in favor of another. In the next place, cases may arise in which one cosurety, by reason of his default in performing his duty toward the other, may estop himself from asserting the equity which he would otherwise have had against him. Some such cases have been suggested by Mr. North in the course of his argument. But neither of those principles appears to me to apply in the present case, because here the contract upon which the security was given was made between the debtor and two of the cosureties, and was not communicated at the time of their contract of suretyship to the other cosureties, and there appears to me to be nothing in the conduct of the plaintiffs (upon the assumption on which I am now proceeding) which can deprive them of the benefit of their right against the cosureties. Therefore on this assumption I hold that the plaintiffs would be entitled to the benefit which they claim.

Indemnity in the hands of a surety will inure to the benefit of other sureties who make their contract later. Farmers' Nat. Bank v. Teeters, 31 Ohio St. 36.

In an action between cosureties for contribution, the defendant can not avail himself of an indebtedness of the plaintiff to the principal as a defense. Davis v. Toulmin, 77 N. Y. 280.

HARRIET HOOVER, APPELLEE, *v.* J. J. MOWRER ET AL., APPELLEES, AND JAMES HOOVER ET AL., APPELLANTS

84 *Iowa* 43, 50 *N. W.* 62, 35 *Am. St.* 293 (1891).

Beck, C. J.: The note upon which the suit was originally brought was executed by J. J. Mowrer and his wife, Sarah Mowrer, to R. W. Adams, E. O. Craig, C. Hoover, Sr., and James Hoover, and by them indorsed to the plaintiff. The purpose of the note was to raise money for the makers upon the credit of the payees and indorsers, they becoming security for the makers. The note was the renewal of prior notes made by the parties, and a continuance in fact of the prior transaction. The Hoovers filed a cross-bill alleging that since the commencement of the action they had paid the note to the holder; that the Mowrers are insolvent;

and that, for the purpose of protecting all the sureties, they executed to Craig & Adams a mortgage upon certain town lots and a stock of general merchandise owned by them, and they took possession of the goods, and converted them to their own use. Upon this cross-bill the Hoovers pray that Craig & Adams be required to account for the value of the goods, and that the mortgage inure to the benefit of all the sureties, and that to that end, and for the purpose of protecting all, proper judgment be entered in their favor for one-half the value of the goods. Craig & Adams deny that they are cosureties of the Hoovers, and are liable to share with them the proceeds of the mortgaged property, and apply any part thereof to discharge their liability on the note.

We are first required to determine whether Craig & Adams may appropriate the proceeds of the mortgaged property to their exclusive benefit, or whether the mortgage should be regarded as security for all of the indorsers of the note. Counsel for the appellees state quite correctly, we think, the rule of law, "that securities obtained by one surety inure to the benefit of all." But he limits the application of the rule to cases where the securities have been obtained after all the sureties have become liable, and without any agreement to that effect before they become liable. We think these conditions alone do not limit the rule, and that its application extends to all cases where a surety attempts, by fraud or unfair dealings, to obtain advantage over his cosurety. The authorities cited by counsel, we think, do not support his position. The rule exists for the protection of the sureties, and not for the good of the creditors or the principal debtor. By the contract of sureties, they become severally bound for the debt of the principal. But it is plain that each should contribute equally in case they are called upon to pay the debt. One can not in any way escape the burden while his cosurety is not relieved. When they enter into the contract, they do so subject to that equitable rule, which becomes, as it were, a contract between them. Each surety is authorized to rely upon this rule to protect himself from imposition and fraud which his cosurety and principal might practice upon him. The principal by indemnifying one of the sureties, would relieve him of the burden of the suretyship which the other still carried. This would be unfair and inequitable. In cases it is done with the knowledge and consent of the other surety, it would thereby be relieved of objection, for the surety would not complain of that to which he assents. And when sureties do not become bound at the same time or by the same contract, as when additional or further security is demanded, and another surety becomes bound in response to such demand, the sureties can doubtless stipulate for indemnity; for, by so doing, they do not prejudice the prior or subsequent surety, whose burden is not affected by the indemnity, and who, as he did not become bound by the same contract with the

other surety, can not claim equality with him. In our opinion, when several sureties become bound by the same instrument, one can not arrange with the principal for indemnity for himself without the knowledge and assent of the others. In the case before us, the sureties become bound by the same instrument, and no assent was given by the Hoovers that Craig & Adams should obtain indemnity by the mortgage. Neither did the Hoovers have knowledge as to the indemnity obtained by Craig & Adams. In our opinion, the proceeds of the security acquired by them must be held for the benefit of all the sureties. The district court erred in dismissing the cross-bill.

It appears from the evidence that Craig & Adams realized eleven hundred and twenty-six dollars and forty-two cents out of the goods. They paid for rent, clerk hire and other expenses, which are not disputed by counsel on either side, one hundred and fifty-eight dollars and seventy-five cents. They also paid fifty dollars attorneys' fees in defending against a garnishment proceeding to charge them for the mortgaged property. As these fees were expended in protecting the property which created the fund now in question, they ought to be paid out of that fund. A mortgage on the goods to Cook, amounting to two hundred and eighty-six dollars and eighty-five cents, was paid by Craig & Adams. It was executed by J. J. Mowrer and not by his wife, to whom the goods had been transferred, and who executed the mortgage to Craig & Adams. Counsel for the Hoovers insist that the mortgage did not bind the property, and, therefore, should not have been paid. But, as J. J. Mowrer was in possession of the goods and conducting the store as his own, it is hardly probable that his wife could successfully set up a claim against the mortgage to Cook. It is not shown that at the time there was any lien against the property superior to the mortgage to Cook. We think Craig & Adams should have credit for the amount paid upon the mortgage—two hundred and eighty-six dollars and eighty-five cents. This, added to the other expenditures approved, gives four hundred and sixty dollars and sixty cents, the sum to be allowed them. They claim that they should be allowed two hundred and two dollars on account of a note on which Adams was surety, which he paid, and seventy-five dollars owed directly by Mowrer to Adams. The mortgage taken by Craig & Adams operated for the benefit of all the sureties. They ought not to be permitted to lessen the funds realized from the mortgage by appropriating it to their individual claims. They stand as trustees for all the sureties, and are required to use that trust fund for the benefit of the sureties alone. The goods realized eleven hundred and twenty-six dollars and forty-two cents; expenses and Cook mortgage, four hundred and sixty-five dollars and eighty-five cents; having six hundred and sixty dollars and fifty-seven cents to be paid for benefit of sureties. One-half of this sum

the Hoovers are entitled to recover, for which a decree and judgment will be entered in this court.

The Hoovers recovered judgment against Craig & Adams in this action for eight hundred and forty-seven dollars and ninety-six cents. No complaint is made thereof, and no appeal is taken therefrom; it is not for consideration in this case. The decree dismissing the cross-bill is reversed.

Accord: Scribner v. Adams, 73 Maine 541.

SECTION 8. PAYMENT BY SURETY WITHOUT COMPULSION

ROBERT HITCHBORN *v.* CRAWFIRD S. FLETCHER

66 *Maine* 209 (1877).

Appleton, C. J.: The parties to this suit signed as sureties for Wilson Randall a note of which the following is a copy:

"$530. Searsport, Aug. 19, 1868.

"One year from date for value received we promise to pay P. Simonton or order five hundred and thirty dollars with interest.

"Wilson Randall,
"Robert Hitchborn,
"C. S. Fletcher, Security."

If the defendant, having signed as surety, were prima facie to be regarded as surety for those whose signatures precede his own, still parol evidence is undoubtedly admissible to show his true relation to the note. In the present case it satisfactorily appears that both plaintiff and defendant were sureties for Wilson Randall.

The note having been sued and the plaintiff having paid the same before judgment, he now claims contribution of the defendant.

It is in proof that the payee of the note for a valuable consideration had given time to the principal. The plaintiff was a witness and testifies that when he paid the note he was ignorant of any such agreement, that the defendant had never informed him of its existence, and that he settled the suit in good faith, believing he was legally liable. The defendant was not a witness.

The question presented is whether upon these facts he can recover his contributory share, of the defendant.

By becoming sureties, each impliedly promised the other that he would faithfully perform his part of the contract and pay his proportion of loss in case of the insolvency of the principal. Crosby

v. Wyatt, 23 Maine 156; Dole v. Warren, 32 Maine 94. The surety is not obliged to delay payment until suit is brought. His liability accrues upon the maturity and nonpayment of the contract for which he is a surety. When one of two persons, who, as surety for a third, signed together with the principal a joint and several promissory note, which he paid on its becoming due, though no demand had been made on him; upon an action brought against the maker, it was held that such payment could not be considered as voluntarily made, and that he might sue his cosurety for contribution. Pitt v. Purssord, 8 M. & W. 538. Much more, then, is not a payment voluntary, when the surety pays upon suit, and to avoid further costs; for the general rule is that a surety, who defends an action brought for money deficient, can not claim contribution of his cosureties for costs, unless he was authorized by them to defend. DeColyar on Guaranty, 348. Here, there was no authorization or direction to defend; and, so far as the plaintiff and the defendant know, there was no existing defense which could be made. One surety may be discharged from his principal obligation, without discharging his cosureties. In such case he will not be relieved from his liability to them for contribution. Clapp v. Rice, 15 Gray 557; Boardman v. Paige, 11 N. H. 431. If a surety, with a full knowledge of the facts under a mistaken belief of liability, makes a payment when he is under no legal obligation, it is to be regarded as a voluntary payment for which he can not claim contribution. Bancroft v. Abbott, 3 Allen 524. But if in ignorance of the facts and in good faith he makes payment, when if all the facts were known he would not be liable; he can compel contribution, if he is guilty of no neglect in such want of knowledge. Without knowledge of the facts constituting a defense he could not defend. The defendant, though sued, gave no notice of any existing defense nor did he know of any. Both plaintiff and defendant, as far as they know, when sued were liable upon the note. They were not required to wait for a judgment or the issuing of an execution. Either might make the payment and stop any additional expense. In Warner v. Morrison, 3 Allen 566, it was held to be no defense to an action for contribution among cosureties that the plaintiff, who paid the debt, did not avail himself of the defense of usury, if he was ignorant of the fact of such usury. It can, assuredly, make no difference in the legal rights of parties whether the defense is usury or delay given to the principal, if the surety is alike ignorant in either case of any existing defense, and without fault for such ignorance when the payment is made.

It is written of old, "be not surety above thy power; for if thou be surety, take care to pay it." The plaintiff testified that the defendant said "he wanted what was right in the premises." This is not contradicted. What is right is that the defendant should bear

with the plaintiff his share of the burden they both assumed, and not that the plaintiff without fault should bear the whole.

Defendant defaulted.

Accord: Hardell v. Carroll, 90 Wis. 350, 63 N. W. 275; Craig v. Craig, 5 Rawle 91; Hotham v. Berry, 82 Kans. 412, 108 Pac. 801; Guckenheimer & Bros. Co. v. Kann, 243 Pa. 75, 89 Atl. 807.

In Glasscock v. Hamilton, 62 Tex. 143, it is held that no contribution can be enforced against a cosurety by a surety who has paid the debt without compulsion where it appears that the principal was solvent at the time.

See also Stockmeyer v. Oertling, 35 La. Ann. 467.

A surety who could have defended by pleading the statute of limitations can not recover contribution from his cosurety. Gronna v. Goldammer, 26 N. Dak. 122; Turner's Admr. v. Thom, 89 Va. 745, 17 S. E. 323.

Contra: Bright v. Lennon, 83 N. Car. 183.

A surety who pays a promissory note which he could defeat because of an alteration by the addition of another maker without his consent may compel contribution from cosureties who signed the note subsequent to the alteration. Houck v. Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727.

A surety who has paid a note which was void on account of usury can not obtain contribution from his cosureties. Russell v. Failor, 1 Ohio St. 327, 59 Am. Dec. 631.

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CHAPTER VII

THE RIGHT OF INDEMNITY

SECTION 1. NATURE OF THE RIGHT OF INDEMNITY

LAYER *v.* NELSON

1 *Vernon* 456 (1687).

Where one obligee that is a surety is sued alone, by the custom of the city of London he shall make his cosureties contribute: so where a surety pays a debt, and has no counter-bond, by the custom of the city of London he shall maintain an action against the principal.

DECKER *v.* POPE

1 *Selwyn, Nisi Prius* (13th ed.), 91 (1757).

This was an action brought by an administrator de bonis non of a surety, who, at defendant's request, had joined with another friend of defendant's in giving a bond for the payment of the price of some goods that were sold to defendant; and the surety having been obliged to pay the money, the administrator declared against the defendant for so much money paid to his use.

Lord Mansfield directed the jury to find for the plaintiff; observing, that where a debtor desires another person to be bound with him or for him, and the surety is afterward obliged to pay the debt, this is a sufficient consideration to raise a promise in law, and to charge the principal in an action for money paid to his use. He added, that he had conferred with most of the judges upon it, and they agreed in that opinion.

ISAAC APPLETON ET AL. *v.* TIMOTHY BASCOM ET AL.

3 *Metc. (Mass.)* 169 (1841).

This was an action of debt on a bond for the liberty of the prison limits, and was submitted to the court on the following facts: Timothy Bascom, one of the defendants, was administrator of the estate of Clement Bascom, and the plaintiffs were his sureties on his administration bond, which they executed with him on the 3d of November, 1835. On the 21st of April, 1840, the plaintiffs jointly paid $230 for said Timothy's default, which they were bound to pay by reason of having been his sureties on said bond.

At the December term, 1840, of the Court of Common Pleas, the plaintiffs recovered judgment against said Timothy, in an action for money paid, the amount which they had paid, as aforesaid, by reason of his default. In that action, they filed a specification of their claims, setting forth that they demanded $230 paid by them on account of their having signed a bond as sureties of the said Timothy as administrator of Clement Bascom. Execution issued on said judgment, and said Timothy was committed to the jail at Lowell, on the 23rd of February, 1841, and on the same day he, and the other defendants, as his sureties, executed the bond on which the present action was brought. Immediately after the execution of the bond, said Timothy went without the exterior limits of the city of Lowell, without the consent of the plaintiffs, and without being discharged by law. He afterward took the poor debtors' oath.

WILD, J.: This is an action of debt on a bond given for the liberty of the prison limits, and the question is, whether the principal in the bond, after the giving of said bond, committed an escape by going without the prison limits. And this depends on ascertaining the time when the contract was made, on which the judgment was recovered, upon which the execution issued, by virtue of which the said principal in the bond was committed to prison. The said judgment was recovered in an action for money paid by the plaintiffs, and which they were obliged to pay, for said principal, by reason of his breach of the condition of an administration bond, which they had executed as his sureties.

The action was founded on an implied promise; and the question is reduced to this, whether the promise was implied by law at the time when the plaintiffs became sureties, or not until they paid the money, when their right of action against the defendant first accrued. And we think it is well settled, that when a surety becomes bound for his principal and at his request, the law implies a promise of indemnity by the principal to the surety to repay the

latter all the money he may be compelled to pay the creditor in consequence of his assumed liability. So the law is laid down in Wood v. Leland, 1 Metc. 389, and so it was decided in Gibbs v. Bryant, 1 Pick. 121, in Howe v. Ward, 4 Greenl. 200, and in many other cases. In Gibbs v. Bryant there had been given a written promise of indemnity, and the court say that "the written contract produced contained nothing more than what the law would imply." And so the law has been well settled for a long time, although in ancient times no action at law could be maintained where a surety had paid the debt of his principal; the only remedy being to be had in a court of equity. But very many equity principles have been adopted by courts of law in modern times, allowing actions to be maintained on implied promises by the party to do what justice and equity require to be done, where there is no express contract. And the implied promise of indemnity in the present case must be considered as made at the time when the plaintiffs became responsible to the creditor on the bond.

The plaintiff's liability was the consideration of the principal's implied promise of indemnity, and the promise must be considered as made at the time when that liability was assumed. And the plaintiffs, when they paid the money, might have declared on said implied promise, or for money paid, in common form, as the declaration was. The time of making the contract is not to be determined by the form of the action.

The other objection made by the defendants' counsel is, that the law does not imply a promise to the plaintiffs jointly; and the case of Gould v. Gould, 8 Cow. 168, seems to countenance this objection. But a more reasonable doctrine is maintained in other cases. Osborne v. Harper, 5 East 225; Pearson v. Parker, 3 N. H. 366; Jewett v. Cornforth, 3 Greenl. 107. According to the decisions in these cases, when money is paid by two or more sureties jointly for the principal, or when the money paid is raised on their joint credit, their proper remedy for reimbursement is a joint action; but if they pay separately, then their proper remedy is by separate action, and a joint action can not be maintained. In either case, however, the action, whether joint or several, is founded on the promise of indemnity expressly or impliedly made at the time when the sureties first became bound. When a promise is implied by law, such a promise is implied as will give to the party who may suffer damage by the breach of it a suitable and proper remedy. We consider, therefore, the promise of Bascom, to indemnify his sureties, as made to them jointly and severally; and as it appears that they paid the money, which they became liable to pay, jointly, they were well entitled to a joint action against him for reimbursement.

Judgment for the plaintiffs.

One having signed a note as surety for two principals and having been compelled to pay it, may sustain a several action against either one of the principals and recover the amount paid. Clay v. Severance, 55 Vt. 300.

The right to indemnity was allowed even though the surety signed without the knowledge of the principal. Hecker v. Mahler, 64 Ohio St. 398, 60 N. E. 555.

Contra: Carter v. Black, 4 Dev. & Bat. Law (N. Car.) 425; Executors of White v. White, 30 Vt. 338; Devereux & Battle's N. C. Equity Rep.

CONSOLIDATED EXPLORATION AND FINANCE COMPANY *v.* MUSGRAVE

1 *L. R. Ch. Div.* 37 (1900).

The object of this action was to obtain the retransfer to the plaintiffs (a company in voluntary liquidation) of 1,500, £1 preference shares in the London Woollen Company, Limited, the second of the two defendants on the record, which had been transferred by the plaintiff company into the name of Christopher George Musgrave, the first defendant on the record. The plaintiffs claimed, inter alia, a declaration that the defendant Musgrave was trustee for them of the shares, and retransfer. The defendant Musgrave pleaded that he was entitled to hold the shares as security for £1,500, estreated bail given to produce a prisoner for criminal prosecution, and certain costs, under an arrangement made between himself and one Ainsworth, acting, as he alleged, on behalf of the plaintiff company.

At the end of the year 1897 criminal proceedings were pending against Ainsworth, one Jordan, and a number of others, in regard to fraud committed in promoting a company called Thomas Edward Brinsmead & Sons, Limited.

The terms on which the defendant Musgrave claimed to hold the shares as security were comprised in the following letter from him to Ainsworth, also dated December 23, 1897:

"In consideration of your transferring into my name 1,500 shares in the London Woollen Company, Limited, I agree to become surety for you and Mr. Francis Richard Jordan in the sum of £1,500, each to appear at the High Court of Justice on the trial of Regina v. Brinsmead and others and also to enter into the required recognizances with regard thereto and as to payment of costs.

"And I further agree in the event of my not being called upon under the terms of my recognizances to make any payment to retransfer the said shares to you or in the event of my being called upon to provide any sum of money to dispose only of sufficient shares to recoup me for the amount so paid by me, it being clearly

understood on the other hand that should I be called upon to pay such an amount as the shares in question are not sufficient to realize that you will pay me any such amount over and above the amount realized by the sale of the shares."

At that time an application had been made for a writ of certiorari to remove from the Central Criminal Court to the Queen's Bench Division of the High Court.

Musgrave gave bail in the stipulated amount for the appearance of Ainsworth and Jordan in the High Court. The application for a writ of certiorari, however, fell through owing to the fact that one of the persons prosecuted absconded. The defendant Musgrave then gave bail for the production of Ainsworth to meet his trial at the Central Criminal Court, in the amount of £1,500, and gave similar bail for the production of Jordan.

Jordan absconded, and bail given for his production was estreated.

The transfer from the plaintiff company to Musgrave was made in pursuance of a resolution of persons purporting to act as the board of directors of the plaintiff company on December 23, 1897, evidenced by a minute in the minute-book of the plaintiff company in the following terms: "The matter of guaranteeing costs Re Brinsmead was considered, and the Consolidated Contract Corporation having agreed to pay by way of premium £100, and guaranteeing to indemnify this company against loss, it was resolved that 1,500 shares (London Woollen Preference) be lodged with Mr. C. C. Musgrave on receipt of cheque from the Consolidated Contract Corporation, and a further 1,000 London Woollen Preference shares with Mr. J. Pronk."

North, J., after deciding that, apart from the question of illegality, the defendant Musgrave would have had a right to the security he claimed, continued: The second question is whether the acceptance of security by Musgrave through Ainsworth was an illegal bargain; in my opinion it was. It is said that the circumstances of this case are outside the rule exemplified by Wilson v. Strugnell, 7 Q. B. D. 548 (1); Herman v. Jeuchner, 15 Q. B. D. 561 (2); that, though those cases show that an accused person can not himself give security legally to his bail, the rule does not apply to cases where security is given to bail by a third person. For that proposition I find no authority whatever. It is true that there is no authority addressed particularly to the distinction attempted to be drawn; the exact case does not seem to have arisen; there is no such case in the books.

I asked if a passage in a single text-book could be found expressing an opinion in favour of the distinction raised. I was referred to two text-books. The passages cited from them do not give what I asked for. Both books seem to me correctly to represent the decisions in the two cases I have mentioned. In Pollock on Contracts (6th. ed., p. 316) the law is stated thus: "An agree-

ment by an accused person with his bail to indemnify him against liability on his recognizances is illegal, as depriving the public of the security of the bail." Again, Leake (3rd ed., p. 626), in his valuable work on the same subject, puts it in this way: "Any contract or engagement having a tendency, however slight, to affect the administration of public justice would be illegal and void." Among the instances he gives is "an indemnity given by a defendant in a criminal case to his bail, because in effect it deprives the public of the intended security for the conduct of the defendant." What the learned author says corresponds exactly with what the late Master of the Rolls says in Herman v. Jeuchner (2), 15 Q. B. D. 561. After defining broadly a contract, he says (3), 15 Q. B. D. 563: "When the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and can not be enforced. In the present case the defendant required the plaintiff to deposit £49 for the space of two years, and in consideration of the plaintiff so doing the defendant promised the plaintiff to become surety for him: the plaintiff on his part undertook to deposit the £49. That is the substance of the contract; is it illegal? To my mind it is illegal, because it takes away the protection which the law affords for securing the good behaviour of the plaintiff. When a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound at his peril to see that his principal obeys the order of the court: at least this is the rule in the criminal law; but if money to the amount for which the surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed. Therefore the contract between the plaintiff and the defendant is tainted with illegality."

When Musgrave became bail he had cast upon him duties and given to him corresponding powers to enforce them, which powers no third person who became responsible could have. What these powers are and the reasons for them in criminal cases are stated in Petersdorff on Bail, p. 514, in these words: "It is essential for the security of the bail that the principal should be compelled to appear at the time and place specified in the recognizance. To enable the bail to effectuate this purpose, they are invested with the same unrestricted authority over the person of the defendant, as we have already seen is conferred upon them in civil cases. Indeed, in criminal proceedings, the power possessed by the bail, in obliging the accused to fulfil the terms of the recognizance, should be even more unlimited, as by not rendering him they not only forfeit to the public the penalties imposed by law, but perhaps create, in crimes of a flagrant nature, an impossibility of the ends of justice being accomplished. Hence they may seize his person at any time (as on a Sunday), or at any place, to carry him to a jus-

tice to find new sureties, or be committed in their discharge, and in surrendering the principal they may command the co-operation of the sheriff, and any of his officers." Therefore, it is essential that the person giving bail should be interested in looking after and, if necessary, exercising the legal powers he has to prevent the accused from disappearing: this is essential for the protection of the public, and anything that tends to prevent or hinder him so doing is illegal. Why is it not equally illegal for the bail to be indemnified by a third person, it being admittedly illegal to be indemnified by the prisoner? The reason of the illegality is the same in each case. It is said that the public still have in the person who gives indemnity the same security of a person whose interest it is to produce the prisoner. That is not so, for he has not the power of the bail. It seems to me, therefore, that the security given by Ainsworth to Musgrave is illegal and void.

Then it is said that the plaintiff company can not get back the shares. I do not see why. I can understand that if Ainsworth were proceeding against Musgrave there would be a difficulty in his way. But it turns out that the shares do not belong to Ainsworth but to the plaintiff company, who are in no way participators in the illegality. I must declare that the security is illegal and void, and make an order for reconveyance.

Accord: United States v. Ryder, 110 U. S. 729, 28 L. ed. 308.

Contra: Carr v. Davis, 64 W. Va. 522, 63 S. E. 326, 20 L. R. A. (N. S.) 58n, 16 Ann. Cas. 1031.

In Jones v. Orchard, 16 C. B. 614, it was held that a contract for indemnity on a bail bond is valid to the extent of the costs paid by the surety on the default of the principal, though invalid as to the penalty paid.

SECTION 2. WHEN THE RIGHT ARISES

WM. W. RICE *v.* JOHN P. SOUTHGATE

16 *Gray (Mass.)* 142 (1860).

The case was submitted to the judgment of the court upon the following facts: The lot was bought by the tenant in 1846, and has since been occupied by him with his family as a residence, and is worth at least two thousand dollars above a mortgage thereon. On the 16th of May, 1853, the tenant, with Charles White and Eli Thayer, made a joint and several promissory note for $1,000, which was paid by White, on the 14th of May, 1859; and on the 16th of November, 1854, made a note for $1,166.66, which was signed by White and Thayer as sureties, and paid, with interest, by White on the 21st of July, 1859; and White proved the sums so paid, amounting to $1,821.94, against the tenant's estate in insolvency.

Bigelow, C. J.: The question in this case is, whether, on the facts stated, there are any debts proved against the estate of the tenant in insolvency to the amount of eight hundred dollars, which were contracted prior to the passage of St. 1855, ch. 238, under which he claims to hold the demanded premises as a homestead. If there are, then it is clear that he can not avail himself of the exemption secured by that statute; because by the third section it is provided that no property shall be exempted from levy on execution for a debt contracted previously to the passage of the act; and all the estate of the debtor, which might have been taken on execution against him at the time of the commencement of the proceedings in insolvency, vested in his assignee under St. 1838, c. 163 5. Woods v. Sandford, 9 Gray 16.

Upon well-settled principles, it is clear that the contract of a principal with his surety to indemnify him for any payment which the latter may make to the creditor in consequence of the liability assumed takes effect from the time when the surety becomes responsible for the debt of the principal. It is then that the law raises the implied contract or promise of indemnity. No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred. The payment only fixes the amount of damages for which the principal is liable under his original agreement to indemnify the surety. Gibbs v. Bryant, 1 Pick. 121; Appleton v. Bascom, 3 Metc. 169. The same principle is adopted in our insolvent law, in which it is provided that, in case of the payment of any sum by any surety of a debtor in any contract whatsoever, the debt shall be considered as contracted at the time when the contract on which such payment has been made was originally entered into. St. 1838, c. 163, 3; Gen. St. c. 118 25.

It follows that the real estate occupied by the insolvent debtor was not exempted from levy on execution at the suit of his surety who entered into the contract on which he has been held liable to an amount exceeding eight hundred dollars prior to the passage of the act under which the tenant now claims a homestead right. It therefore vests in his assignee.

Judgment for the defendant.

SMITH *v.* YOUNG

173 *Ala.* 190, 196, 55 *So.* 425 (1911).

Mayfield, J.: Although a surety can not maintain an action against his principal on the liability created by the suretyship, until such surety has paid the debt or a part thereof, it is because the right of action does not come into existence until such payment,

and not because the relation of debtor and creditor did not theretofore exist. The same thing is true as to the creditor or payee of a note signed by the principal and surety. The payee can not sue the principal or the surety until the note is due, yet the relation of debtor and creditor certainly exists from the making of the note. While a surety probably could not file a creditor's bill as to conveyances by his principal until he had paid the surety debt, yet he is a creditor within the protection of the statutes from the inception of his contingent liability; and, after he has paid the surety debt, he may maintain his creditor's bill against the principal and other creditors to set aside fraudulent conveyances made while the liability of the surety was contingent, or to have them declared general assignments.*

URIAH J. BULLOCK *v.* BERNARD M. CAMPBELL

9 *Gill (Md.)* 182 (1850).

MAGRUDER, J.: The plaintiff below (who is the plaintiff here), instituted this suit May 18, 1846, to recover so much money paid for, and at the instance of the defendant. This money was paid by the plaintiff to the holder of a promissory note, drawn by the defendant, payable to the plaintiff, and by him indorsed. Upon this note the holder instituted a suit against the plaintiff, recovered a judgment, which the plaintiff here paid in part, and for the amount paid by him, this action was instituted. It was instituted more than three years after the note became due, but less than three years after the payment was made. Pu

If the plaintiff has a good cause of action, the plea of limitations is no bar to it, unless the time is to be computed from the day the money was to have been paid. But the statute does not begin to run in the case of principal and surety, until the time when the payment is made by the latter. This, if ever it could have been questioned, is now settled law. See Gillespie v. Creswell, 12 Gill & John. 36.

The plaintiff had no cause of action, until he was compelled to pay the money, and until he has a right to sue, limitations can not begin to run.

But the plaintiff paid only a part of the money due on the note, and it is insisted that he must pay the whole of it before he can sue for the money paid by him. This would be true, if the suit was instituted upon the note itself. But why not be permitted to

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*Only part of the opinion.

Accord: Smith v. Pitts, 167 Ala. 461, 52 So. 402; Loughridge v. Bowland, 52 Miss. 546.

sue for and recover, that which he has been obliged to pay? Very much of evil might arise to securities, if the law required them to pay the whole amount of the note in order to recover that which they have paid for the use of the principal. It is said that it gives to securities a right to make several causes of action of but one. If this be a fatal objection to the recovery, then when there are two securities, and each pays a part, it would seem that neither could recover. But whose fault is it that the balance is not paid? It is the fault of the appellee, and surely it can be no defense for him in an action brought to recover from him what has actually been paid for him, that he, himself, has not paid any part, although he was bound to pay the whole. That several suits may be brought in a case of this description, if the security is obliged to make several payments, was decided in Pownal v. Ferrand, 13 Eng. Com. Law Reports 230.

This decision does not allow a creditor to make several claims of one. The note is not the plaintiff's cause of action. He instituted this suit for all that he could claim when it was brought, and if afterward he is obliged to pay another sum of money, because of a failure by the defendant to pay the debt, he will then have another distinct cause of action in which the plea of limitations will be no bar, until three years after such last payment, although it would be a bar to a recovery of the earlier payments, if they were made more than three years before the security sued for the amount of them.

As a further objection to the plaintiff's recovery it is urged that he can not maintain an action upon the implied assumpsit, because the note contains an express promise to pay, and there was a consideration for it. But the circumstances show not only the absence of all consideration, as a contract between the plaintiff and defendant, but also, that by the express understanding of all the parties to the note, although in form, it was payable to the plaintiff, yet he was not to receive one cent of the money mentioned in it. It was made payable to him, not because he was the person to whom it was due, but in order that the plaintiff, by indorsing it, might be liable as indorser in case the defendant failed to pay it to the only real payee. It is a note which the defendant was bound to pay, but was not at liberty to pay to the person named in it as payee. The plaintiff by indorsing it, has been obliged to pay money which was due from the defendant, which the latter was bound to pay, as it was his debt; and he has now no right to say that he ought not to be compelled to refund until the plaintiff has paid more money, due only from the defendant.

Upon neither of the grounds which have been relied on, can this judgment be affirmed.

Judgment reversed with costs, and upon the statement of facts, judgment for the plaintiff according to the agreement.

Judgment reversed.

CORNELIUS C. VERMEULE *v.* YORK CLIFFS IMPROVEMENT COMPANY

105 *Maine* 350, 74 *Atl.* 800, 134 *Am. St.* 553n (1909).

Spear, J.: This is an action brought by Cornelius C. Vermeule against the York Cliffs Improvement Company to recover the sum of $5,694.01 for so much money paid by the plaintiff for the use and benefit of the defendant corporation. The plaintiff is a resident of the state of New Jersey and John D. Vermeule is a resident of New York City. The defendant is a domestic corporation of the state of Maine. The writ contains the common counts for money paid and expended with an account annexed of the following tenor:

"York Cliffs Improvement Company to Cornelius C. Vermeule, Dr.

"To money paid August 1, 1906, as surety on your note dated the 24th day of November, 1897. $5,694.01."

The facts upon which this plaintiff seeks to recover are these: The York Cliffs Improvement Company required for its use the sum of $10,000, for which, on November 24, 1897, it executed and delivered a demand note payable to the order of John D. Vermeule. Upon the note was this indorsement: "This note is given to be held by John D. Vermeule as collateral security for moneys to be advanced by him to York Cliffs Improvement Company to pay its outstanding bills payable, accounts payable and current expenses." Then appears the further indorsement: "I hereby assume liability for all money to become due or to be secured by this note to the extent of 11-27 of the entire amount. C. C. Vermeule." There is another indorsement upon the note of a similar import but immaterial in the discussion of this case.

Now it appears that John D. Vermeule, having advanced payments upon the note whereby C. C. Vermeule became liable upon his contract, on the 24th day of September, 1901, brought suit in the Supreme Court of New Jersey against him for his proportion of the amount due. On the 12th day of June, 1906, John D. Vermeule recovered judgment against C. C. Vermeule upon which execution was issued and delivered to the sheriff for levy.

Prior to the date of this judgment, C. C. Vermeule had filed a bill in equity in the court of chancery for the city of New Jersey wherein he claimed, among other things, that John D. Vermeule had been, and was, a copartner with himself; that their final accounts had never been settled; and praying for an accounting and settlement of the alleged copartnership affairs. This bill was pending when the above judgment and execution were issued.

Upon the rendition of the judgment at law C. C. Vermeule, the defendant in that suit, filed in the equity suit, in which he was

plaintiff, a prayer for an injunction to restrain the collection of the judgment and the levying of the execution, whereupon he was required by decree of the court to deposit with it the sum of money due upon the execution, to be held to await the determination of the bill and further order of the court. The deposit was made by C. C. Vermeule as required and, at the rate of his writ in the present suit against the defendant corporation, the bill had not been determined and no further order had been made, the money deposited still remaining in the custody of the court. Upon making the deposit C. C. Vermeule took the following receipt:

"Whereupon the said C. C. Vermeule did pay and deposit in court the sum of $5,694.01, as appears by the record of the clerk of said court as follows:

"In Chancery of New Jersey

"Between

"Cornelius C. Vermeule, Complainant,

"and

"John D. Vermeule et al., Defendants.

"On Bill, etc.

"Received, this first day of August, one thousand nine hundred and six, of Cornelius C. Vermeule, through McCarter and English, his solicitors, the sum of five thousand six hundred and ninety-four dollars and one cent ($5,694.01), being the amount due at this time from the said Cornelius C. Vermeule, complainant above named, to John D. Vermeule, the defendant, upon a judgment obtained in the New Jersey Supreme Court on the twelfth day of June, nineteen hundred and six, in a case therein pending, wherein said John D. Vermeule was plaintiff, and the said Cornelius C. Vermeule was defendant."

Upon this state of facts the plaintiff in the present action contends that the case shows a complete discharge of the defendant company for that proportion of the defendant's note for which he became surety. On the other hand the defendant claims that inasmuch as the bill in equity has not been fully determined and no further order of the court made in regard to the disposal of the deposit, the defendant's liability upon the note is not discharged since it says it has never received and does not have any possession, use or control of, the amount deposited or any part thereof.

It is well settled in this state that in an action by a surety against his principal it is necessary for the plaintiff to prove that he has paid the debt or discharged the principal for the amount which he seeks to recover, in order to maintain his action. Ingalls v. Dennett, 6 Maine 79; Emery v. Hobson, 62 Maine 578; also Davis v.

Smith, 79 Maine 351. When upon such a contract in which the principal is liable, the surety either pays the debt for which he has become liable or extinguishes it so that it no longer is a debt against the principal, the law implies a promise on the part of the principal to reimburse the surety for the amount paid. Therefore the sole question in the case at bar is, had the plaintiff paid the debt for which he became surety, or by his act extinguished it as a liability of the principal?

We are of the opinion that upon the facts reported, the defendant company is discharged of its liability upon its note to the amount paid into court by the plaintiff and that he has paid the note pro tanto. The facts clearly show that in the equity court no question whatever is raised respecting the validity of the judgment against C. C. Vermeule as surety upon the note of the defendant corporation. Nor is any question made that the amount so paid was to be accounted for in payment of the judgment. C. C. Vermeule's receipt for the deposit unquestionably concedes the validity of the judgment and the amount due upon it. He specifically says, "being the amount due at this time * * * to John D. Vermeule * * * upon a judgment obtained in a New Jersey Supreme Court," etc.

"The defendant, however, upon the effect of the deposit presents the issue precisely as we understand it, namely: "This necessarily implies that the money thus alleged to have been so paid must have passed completely beyond control of, and the possibility of any return to, the plaintiff, and at the same time must have passed into the actual possession of, or for the use and benefit of, the defendant.

"Now what has occurred? Has either the plaintiff thus parted with his money or defendant thus received it, for its use or benefit? Neither. Non constat yet what would become of the money."

We are unable to agree with the defendant's analysis. We see no way in which the judgment against C. C. Vermeule can be attacked. We regard the payment in court, as a deposit for the payment of a judgment which is as conclusive upon C. C. Vermeule as if he had paid the money upon the execution. The only difference between the deposit and such payment being, that the money due upon the judgment of John D. Vermeule may be distributed according to the decree of the equity court but as the property of the latter. The fact that this money may, under the order of the court, be paid to the creditors of John D. Vermeule, or to C. C. Vermeule in the settlement of the copartnership affairs, in no way changes the effect of the judgment against C. C. Vermeule, as a payment by him as surety upon the defendant's note. We think it does appear, as a matter of law, that the plaintiff has paid the amount of money, for which he seeks to recover, for the use and benefit of the defendant company, and that it is fully discharged

from liability upon the note to the amount of such payment. The entry therefore should be,

Judgment for the plainttiff for $5,694.01 and interest from August 1, 1906.

The acceptance by the creditor of the note of the surety, in satisfaction of the demand, is equivalent to actual payment. Hoe v. Buffalo, N. Y., &c., R. Co., 37 N. Y. 297.

SECTION 3. AMOUNT RECOVERABLE

REED *v.* NORRIS

2 *Mlyne & Craig* 362 (1837).

Richard Bevan the younger, being indebted to his father, Richard Bevan the elder, in the sum of £1,000, gave to his father a bond in the penal sum of £2,000, dated the 22d of April, 1797, and conditioned to be void upon payment of the sum of £1,000 with interest at five per cent. Richard Bevan the elder being, at a subsequent period, indebted to Lord Vernon, in the sum of £500, prevailed upon his son, Richard Bevan the younger, to join him, as his surety, in a bond to Lord Vernon in the penal sum of £1,000, dated the 24th of August, 1801, and conditioned to be void upon payment of £500, and interest. Upon that occasion, the following indorsement was made upon the bond for £1,000, and signed by both father and son: "Whereas, the within bounden Richard Bevan hath, on the 24th of August, 1801, become jointly and severally bound, in a certain bond or writing obligatory, to the Right Honorable Lord Vernon, in the penal sum of £1,000, conditioned for the payment of £500 with interest; and whereas, the said sum of £500 is the proper debt of the said Richard Bevan the elder, and the said Richard Bevan the younger is the surety of the said Richard Bevan the elder: it is, in consideration thereof, agreed that the said Richard Bevan the younger shall not be called upon to pay the within mentioned principal sum of £1,000, until the said Richard Bevan the elder shall have paid and satisfied all principal money and interest due on the said bond so given to Lord Vernon and delivered the said bond, canceled, to the said Richard Bevan the younger; as witness our hands this 24th of August, 1801."

The Lord Chancellor: In this case the object is to obtain payment, on the part of an obligee in a bond for £1,000, of what is due for principal and interest upon that bond. The demand is resisted on various grounds. It appears that there being a bond for £1,000 in which the son was obligor, and which was given to the father as obligee, a debt arose between the father and Lord Vernon, and the

father became indebted to Lord Vernon in £500 secured by bond, and the son became surety in that bond; and then this memorandum of an agreement between the father and son, was indorsed on the bond for £1,000. (His Lordship read the memorandum.) * * *

The other question is, how far the representative of the son, the surety having come to an arrangement with Lord Vernon's executors, by which the bond for £500 has been got rid of and discharged, are entitled, as against the father's estate, to demand more than they have actually paid to Lord Vernon's executors in exoneration of the liability of the son's estate upon the bond for £500.

Now, if there had been no authority upon this subject, I should have found very little difficulty in making a precedent for deciding that, under these circumstances, the surety is not entitled to demand more than he has actually paid. I take the case of an agent. Why is an agent precluded from taking the benefit of purchasing a debt which his principal was liable to discharge? Because it is his duty on behalf of his employer, to settle the debt upon the best terms he can obtain; and if he is employed for that purpose, and is enabled to procure a settlement of the debt for anything less than the whole amount, it would be a violation of his duty to his employer, or, at least, would hold out a temptation to violate that duty, if he might take an assignment of the debt, and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle. Does not the same duty devolve on a surety? He enters into an obligation and becomes subject to a liability, upon a contract of indemnity. The contract between him and his principal is, that the principal shall indemnify him from whatever loss he may sustain by reason of incurring an obligation together with the principal. It is on a contract for indemnity that the surety becomes liable for the debt. It is by virtue of that situation, and, because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrangement with that creditor. It is his duty to make the best terms he can for the person in whose behalf he is acting. His contract with the principal is indemnity. Can the surety, then, settle with the obligee, and instead of treating that settlement as payment of the debt, treat it as an assignment of the whole debt to himself, and claim the benefit of it, as such, to the full amount; thus relieving himself from the situation in which he stands with his principal, and keeping alive the whole debt?

As I have said, I would make a precedent if there were none; but it is very satisfactory to me to find that the question came before Lord Eldon, and that he decided it in the cases which have been cited, viz., Ex parte Rushforth, 10 Ves. 420, and Butcher v. Churchill, 14 Ves. 567. Lord Eldon did not decide those cases upon particular grounds of equity between the parties; but he lays

it down as what he considered to be the rule of this court, that where a surety gets rid of and discharges an obligation at a less sum than its full amount, he can not, as against his principal, make himself a creditor, for the whole amount; but can only claim, as against his principal, what he has actually paid in discharge of the common obligation. I am clearly of opinion, therefore, that the representatives of Richard Bevan the younger can in this case claim only the amount which was actually paid in satisfaction of the bond given to Lord Vernon.

Accord: Stanford v. Connery, 84 Ga. 731, 11 S. E. 507; Martindale v. Brock, 41 Md. 571.

LA MOTT THOMPSON ET AL. *v.* LAURA G. TAYLOR, AS EXECUTRIX, ETC.

72 *N. Y.* 32 (1878).

This action was brought to marshal the assets of the estate of said deceased, and to distribute them among the creditors.

In 1870 James B. Taylor died insolvent, owing debts to a large sum, among which were several promissory notes, amounting in all to about $80,000, on which Matteson was liable as his accommodation indorser and surety. The notes having become due, and Matteson having been sued, or threatened with suit, he arranged with the holders to give security for their payment, they authorizing them to prosecute suits in their names, respectively, for the purpose of collecting the notes out of the estate of the deceased. The referee herein found that in so doing he incurred certain necessary and reasonable costs and expenses, over and above the costs allowed in the judgments, amounting to $14,091.98, which sum was allowed by the referee, and disallowed by the Special Term.

Rapallo, J.: Upon principles of equity, a surety, as between himself and his principal, stands upon a different footing, in some respects, from an ordinary creditor. He is entitled to full indemnity against the consequences of the default of the principal, and is, therefore, entitled to call upon him for reimbursement not only of what he may have been obliged to pay in discharge of the obligation for which he was surety, but also of all reasonable expenses legitimately incurred in consequence of such default, or for his own protection. These do not include expenses incurred in defending himself against the just claim of the creditor, nor remote and consequential damages sustained by the surety, such as sacrifices of property for the purpose of meeting his liability, loss of time, injury to business, expenses incurred in seeking to avoid payment, etc. But we appre-

hend that they do include expenses reasonably incurred for the purpose of securing the application of the property of the principal to the payment of the debt in exoneration of the surety. Such expenses are within the principle of the cases cited on the part of the respondent.

These cases hold that, on the debt becoming due, the surety may go into equity to compel the principal to pay, and the creditor to receive payment; and that he may also, in equity, compel the creditor to proceed against the principal debtor for the collection of his demand, upon giving security and indemnifying the creditor against delay and expenses. It can not be doubted, and is substantially conceded by the appellant, that expenses incurred by the surety in thus compelling action by the creditor would be recoverable against the principal. These would necessarily include such reasonable expenses as the creditor might incur in collecting his demand from the principal and for which the surety was liable, and which he might pay on his contract to indemnify the creditor.

In the present case the surety, instead of proceeding in equity to compel the creditors to prosecute, effected an arrangement with them, whereby he gave security for the payment of their demands, and obtained authority from them to take the necessary proceedings in their names to secure the property of the estate of the debtor, and its application to the payment of the debts for which he was surety; and instead of indemnifying the creditors against the costs and expenses of such proceedings, he himself assumed and paid them in the first instance. By this means the same result was attained as would have been if the surety had, by proceeding in equity, compelled the creditors to proceed against those in possession of the estate of the debtor, and had indemnified the creditors against the expenses of such proceedings, and subsequently performed his contract of indemnity by paying them, the only difference being that he procured the creditors to do voluntarily what a court of equity would have compelled them to do, and thus saved to the estate of his principal the additional expense of proceeding in equity against the creditors.

It is not necessary to construe the Act of 1858 further than to hold that it does not abrogate the principle of equity before referred to. Whether it is declaratory of the same rule, as contended by the respondent, is not material, as a resort to the statute is not required for the purpose of sustaining the order of the General Term.

The order should be affirmed, with costs payable out of the estate.

All concur, except Church, Ch. J., absent.

Order affirmed.

Accord: Downer v. Baxter, 30 Vt. 467.

MATTHEWS *v.* HALL'S ADMR.

21 *W. Va.* 510 (1883).

Snyder, J.:* If the surety discharges the debt of his principal in whole or in part for any sum less than the full amount he so discharges, he can, in the absence of an express contract, recover from his principal only the amount actually paid by him. Blow v. Maynard, 2 Leigh 29. The implied contract in such case is that the surety shall be indemnified only, and he will not be allowed to speculate out of his principal. If he pays in depreciated bank notes, or other money which is below par, but is taken by the creditor at par, he can recover from the principal only the par value of such money. Kendrick v. Forney, 22 Gratt. 748; Butler v. Butler, 8 W. Va. 674; Feamster v. Withrow, 9 Id. 296. He is entitled to recover the amount actually paid by him, and not the amount extinguished by that payment. If he pays nothing he is entitled to recover nothing from his principal. It is on a contract for indemnity that the surety becomes liable for the debt. It is by virtue of that situation, and because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrangement with that creditor. It is his duty to make the best terms he can for his principal. He occupies in that regard the same position as an agent, and can not speculate out of his principal. Brandt on Sur. and Guar. 182.

AARON HAYDEN *v.* FREDERICK CABOT

17 *Mass.* 169 (1821).

Assumpsit upon a written promise of the following tenor: "Eastport, June 1, 1814. Whereas Aaron Hayden, Esq., has this day signed a duty bond, at the Passamaquoddy custom-house, for six thousand forty-one dollars, eighty-two cents, being the supposed amount of duties on one hundred packages of goods imported on the sloop Abro, shipped by Constantine Llufrio, and consigned to S. Bartlet; we jointly and severally promise to hold him harmless from any loss he may sustain by signing said bond." Signed by the defendant and two others.

The case was tried upon the general issue, at sittings here before the chief justice, during the present term.

It was in evidence for the plaintiff, that on the 11th of July,

*Only a part of the opinion.

1814, the British forces captured Eastport, and kept possession of it with a military force; that they got possession of the custom-house, and of the bond referred to in the above-written paper, among other documents and papers; that certified copies of the bonds in the custom-house were preserved by the collector; that after this a monition was posted up, directing the obligors in all the bonds to appear at Halifax, and show cause why they should not be held to pay the bonds to the captors; that in March, 1815, a capias was issued against the obligors; that the plaintiff, and all the other obligors (except one who was arrested, and carried to Halifax, and there detained some time), fled to avoid the process; that the plaintiff came to Boston with his family, and remained here until May, 1815, when he returned to the neighborhood of Eastport; that Eastport was restored to the United States in June, 1817, that the plaintiff was a merchant of respectable standing, and of large business; and that he had many debts due to him, which were probably lost by reason of his absence. The witness could not testify positively that the plaintiff was named in any capias which issued, but he believed that all the obligors were named, and he was certain that the plaintiff's name was in the monition. It was not proved that any judgment had been rendered upon the bonds, which were afterward paid to the United States, by the obligors or others interested; an act of congress having provided for their indemnity against the British claim.

The chief justice, being of opinion that the plaintiff had not been damnified, within the meaning of the contract upon which the action was brought, ordered a nonsuit to be entered, giving liberty for the plaintiff move the court to set aside the nonsuit and grant a new trial, if the action could be maintained upon the facts proved.

Parker, C. J., delivered the opinion of the court.

This case must be considered an experiment to ascertain whether, under such a state of facts, an action can be maintained. No authority in favor of it has been found by the plaintiff's counsel, and this is of itself pretty decisive against the action. The promise of the defendant is, to save the plaintiff harmless from any loss he might sustain in consequence of signing a custom-house bond for duties on goods imported by the defendant.

The common construction of such a contract is, that if the surety is obliged to pay the bond, by suit or otherwise, the principal shall repay him the sum he has been obliged to advance, together with all such reasonable expenses as he may have been obliged to incur, and which may be considered as the necessary consequence of the neglect of the principal to discharge his own debt.

But extraordinary expenses, which might have been avoided by payment of the money, or remote and unexpected consequences, are never considered as coming within the contract. Thus if a surety, by reason of being obliged to pay money for his principal, becomes

embarrassed in his business, and is finally obliged to abandon it, it is not expected that the principal will be held to indemnify him for this consequential misfortune. It is not the natural and necessary effect of his becoming surety, but is occasioned by his undertaking to do what he was not in a condition to perform.

So any loss or expense, occasioned by an attempt to avoid payment of an obligation, can not have been contemplated by the parties as a subject of indemnity, the true meaning of the contract being, that if the surety pays voluntarily, he shall be reimbursed; if he is compelled by suit to pay, he shall also be indemnified for his costs and expenses. Flight, to avoid payment of the debt, is an accident wholly unforeseen, and its consequences can not be considered as provided for. The principal had a right to calculate upon his surety's ability to pay, and did not stipulate to save him harmless from anything but the payment of money. If the surety were put in prison, or if his goods were sold at a sacrifice, these would not be legal grounds of suit for indemnity, because they might be avoided by payment, which he must be considered as stipulating he was able to make.

The indefinite nature and extent of such damages as are claimed in the present action, is also a sufficient objection to the character of the action itself. If a surety, who flies to avoid payment, can recover an indemnity for all the consequences of his flight, such as his loss of business, loss of debts, expenses of removing and supporting his family, the principal would have no means of protecting himself against extravagant claims; so that the danger would rather lie in having a surety, than in becoming one, which has heretofore been thought to be attended with the most hazard. And such are the losses which the present action is brought to repair.

If the principle on which the action is founded is correct, there would be no measure between the original debt and the subsequent liability of the debtor. His surety for a hundred dollars, flying to avoid payment of that sum, might incur expenses to the amount of a thousand, all of which he would have as good a right to claim as any part of it. If the natural limit of such a contract, which is indemnity for the debt and the necessary expenses of obtaining payment, are passed, there seems to be no assignable bounds to the consequences of such a contract.

In the case before us, therefore, if the facts had all been proved by legal evidence, we think they would show no damages for which the plaintiff is entitled to recover. It certainly may be doubted whether the British acquired any property which could have been enforced in any of their own courts of law, in the bonds which were taken possession of when they captured Eastport; and it is not easy to see what process would have been resorted to, to enforce payment. They could not be viewed as assignees; and if they proceeded in rem in their admiralty courts, that would not have pro-

duced the money. It does not appear that the right was ever insisted on; and the bonds have been paid to the United States by the principals.

Had the plaintiff been arrested on any suit, and, to liberate himself, paid the money, or had he defended against the suit at his own expense, his claim would stand on more plausible grounds. At present, it rests only on his having fled to avoid a suit, problematical at least in its issue. He has never paid any money on account of the bond which he signed, or as the necessary consequence of his signing it. The nonsuit must stand.

Costs for defendant.

SECTION 4. NON-LIABILITY OF PRINCIPAL

MARSHALL *v.* HUDSON, ADMX., ETC.

9 *Yerg.* (17 *Tenn.*) 57 (1836).

Lewis Earthman, James Marshall and Zenas Tate, on the 19th day of November, 1819, made and executed their certain note or writing obligatory, sealed with their seals, to the Nashville Bank, for the sum of two hundred and eighty-four dollars and sixty-two and a half cents, due three years after date, bearing interest from the date. Lewis Earthman was the principal debtor in said note, and James Marshall, the plaintiff in this motion, and Zenas Tate were securities to said note. Lewis Earthman died in 1828, and administration upon his estate was, in July, 1828, granted to his widow, Judith Earthman, now Judith Hudson, the defendant, and John S. Cox, who at the July term, 1828, of the court of pleas and quarter sessions of Davidson county court, duly qualified according to law. The administrator and administratrix gave due notice of their appointment according to law. No claim, demand or suit, was exhibited or brought against the administrator and administratrix within two years after their qualification, nor was any request made to the Nashville Bank by the administrator to delay the bringing of suit on said note. The Nashville Bank instituted suit against said Judith, who pleaded the Act of 1789, c. 23, limiting actions against executors and administrators, upon which plea judgment was rendered in her favor; whereupon the Nashville Bank instituted suit against said Marshall alone, upon said note, in the county court of Davidson county, in which suit Marshall relied upon the statute of limitations of two years in favor of the estate of deceased persons (1789, c. 23), and the judgment in favor of defendant as discharging the estate of Lewis Earthman the principal, and that as security he was discharged. The county court decided that said Marshall

was discharged, and upon appeal to the Supreme Court the judgment of the county court was reversed and judgment rendered against said Marshall for the full amount of said note and interest, amounting to ninety-five dollars fourteen and one-half cents, and interest thereon, and also the costs of suit.

Tate was dead, and no suit was brought against his representatives within two years after his death. The Nashville Bank was incorporated by the legislature of Tennessee, and Lewis Earthman, James Marshall and Zenas Tate were citizens of Tennessee, and defendant is a citizen of Tennessee, and surviving administratrix of said Lewis Earthman, deceased. Said defendant now relies upon the Act of 1789, c. 23, as a bar to plaintiff's right to recovery, believing that no cause of action exists against her, and insists that the payment of the money by, or a recovery of the judgment against plaintiff, raises no obligation or liability on behalf of the plaintiff against the defendant. The parties agreed, if, upon these facts, the law is in favor of the plaintiff, judgment is to be rendered for the sum of ninety-five dollars fourteen and one-fourth cents, and interest, the amount of the judgment of the Nashville Bank against plaintiff, and the costs of that suit, and interest from the rendition of the judgment; if in favor of the defendant, judgment is to be rendered for defendant for costs.

Reese, J., delivered the opinion of the court.

The Nashville Bank, at the last term of this court, recovered a judgment against the plaintiff, who was indebted to it as the security of the defendant's intestate; although the plaintiff then urged that he was not liable, because the administratrix had by the judgment of the court, been previously exonerated on the ground of the operation of the statute of limitations against executors and administrators. The question in the case is, whether, having since paid the money to the bank, he can now recover it from the defendant? And the court is of opinion, that he can. To maintain the correctness of this opinion, it is proper to inquire, first into the origin of the plaintiff's cause of action, for the purpose of ascertaining, whether at the time defendant became administratrix he was a creditor within the meaning of the act referred to, and secondly, into the effect upon his rights, produced by the fact that lapse of time had barred the claim of the bank against his principal.

As to the first point, it has been settled that the cause of action, although growing out of the relation of principal and surety created by the original contract, commences in point of time with, and is founded upon the payment of the debt by the surety, or at the earliest, by a statute of our own, upon the rendition of a judgment against him. It is then he becomes a creditor of his principal. It is true, that previously to this, and arising from the relation between them, he is not without some protective and preventive remedies against his principal. He may file a bill against his principal

and the creditor. He may give the creditor notice to bring suit. But it seems to us that these remedies are not founded upon, nor does their existence create the relation of creditor and debtor, within the meaning of the Act of 1789, c. 23.

Secondly, what effect is produced by the fact, that time had barred the claim of the bank against the defendant? It is urged that the operation of the statute for the limitations of actions against executors and administrators, differs from the general statute of limitations, in this, that the latter takes away the remedy only, while the former entirely extinguishes the debt. This difference is supposed to be established by the cases referred to, which determine, that though an acknowledgment, or new promise by an administrator or other person will take a case out of the general statute; yet, such acknowledgment or new promise will not, in the case of the special statute, remove the bar or revive the obligation. It is inferred from this distinction, by the counsel of defendant, that in the latter case the debt is extinguished absolutely and to the same extent as if satisfied by payment or terminated by a release. But in the cases themselves no such inference is announced. These cases assert that the distinction arises from the fact that the special statute is created, not for the protection or benefit mainly of the executor or administrator, but for the protection and benefit of heirs, devisees, or distributees. These special statutes intend that there shall be a determinate period, at which the executor, who is the trustee, both of the creditors and distributees, and a sort of stakeholder between them, shall pass the funds, before that time in his possession for the purpose of paying debts, into the hands of the distributees, whose property they become. It is true, that Justice Story, in the case cited from 5 Mason 111, in referring to a case reported in 15 Mass. Rep. 6, uses the words "extinguishment" and "extinction" in reference to claims barred by these special statutes; but, from an examination of the cases in 5 Mason and 15 Mass. Rep. 6, it is believed it will be clear, that that learned judge means total extinction of the remedy only. It seems to us, upon principle and authority, that perhaps in every instance, where the law creates a bar, or suspends an obligation, it acts upon the remedy; the party himself extinguishes the debt. If, instead of bringing this suit, the plaintiff had sued some administrator of the intestate in Kentucky or Alabama, who had qualified within the last year; will it be contended that he could not have recovered; although in each of those states there had been a statute, identical in terms, with the Act of 1789, c. 23? In some of the states no such special statutes may exist; what in such state but the general statute would prevent the plaintiff at any time from recovering against an administrator of the intestate? This shows that the debt is not extinguished by the bar of the statute; and indeed, this point was determined at the last term of the court, in the case of the

Nashville Bank against the plaintiff, Marshall, and also in the case of the Nashville Bank against Campbell, reported in 7 Yerg. If more than the remedy had been taken away; if the debt had been extinguished, no judgment could have been rendered against the plaintiff, in favor of the bank, at the last term. We are therefore of opinion, that the plaintiff take his motion.

Judgment for plaintiff.

Accord: Sibley v. McAllaster, 8 N. H. 389; Hooks v. Branch Bank, 8 Ala. 580; Godfrey v. Rice, 59 Maine 308.

HARLEY, PLAINTIFF IN ERROR, *v.* STAPLETON'S ADMINISTRATOR, DEFENDANT IN ERROR

24 *Mo.* 248 (1857).

Scott, J., delivered the opinion of the court.

This was an action by a surety to recover from his principal a sum of money he was compelled to pay as such surety. The plaintiff signed a note as surety, given to secure a sum of money bet in this state on a presidential election. The court instructed the jury that if the note paid by plaintiff was given to secure a bet on the presidential election, and the plaintiff, at the time he signed the note, knew it was given for that purpose, the plaintiff can not recover. There was a verdict for the defendant.

In our opinion, the fact that the surety (Harley) was compelled by the judgment of a court in the Mexican dominions to pay the debt does not affect the merits of this controversy. The instruction given by the court assumed, and the court have so found, that the plaintiff knowingly entered into an illegal contract. Whether he paid the money voluntarily, or was compelled thereto by process of law, it is equally against the policy of the law that he should recover in this action. We may presume that but for the plaintiff the contract would never have been made, nor the law violated. This is an attempt to obtain an indemnity for knowingly entering into an illegal contract. It is a rule that, whenever the party seeking to recover appears to have been in any respect contaminated with, or even privy to, the illegal transaction on which the claim is originally bottomed, his remedy, whether upon the primary consideration, or a security substituted for it, is gone. (Paley on Agency 120.) If a surety to a note, securing a sum bet on an illegal wager, can recover against his principal by paying the sum secured, then the policy of the law which forbids the recovery of money lost at unlawful gaming would be defeated. Judge Ryland, concurring, the judgment will be affirmed.

A surety paying a note which he knows to be void on the grounds of usury can not recover indemnity. Roe v. Kiser, 62 Ark. 92, 34 S. W. 534, 54 Am. St. 288.

But see Ford v. Keith, 1 Mass. 139, 2 Am. Dec. 4.

WILLIAM DAVIS *v.* THE BOARD OF COMMISSIONERS OF STOKES COUNTY AND JOHN F. POINDEXTER

72 N. Car. 441 (1875).

READE, J.: In Poindexter v. Davis, 67 N. Car. 112, it was decided, that a bond given for money loaned to pay off a debt which had been contracted in aid of the rebellion was not affected by the illegality of the original debt. In that case the county court of Stokes county had borrowed money of a bank to equip soldiers for the Confederate service. That was of course illegal. The county court subsequently borrowed money of Poindexter to pay off the bank debt. And we held that the illegal consideration of the bank debt did not affect the consideration of the Poindexter debt. The county court gave a bond to Poindexter for the money borrowed of him, and the present plaintiff, Davis, was a surety upon that bond; and the Poindexter suit was against him, and a recovery was had against him, and he has paid a part of the debt, and now seeks to compel the county of Stokes to reimburse him the amount he has paid, and to exonerate him from the balance by the payment thereof by the county, upon the ground that the county is primarily liable.

There is no doubt of the rule, that the principal is responsible to the surety for any liability incurred by the surety at the request of the principal. But that rule is subject to exceptions. A surety for an idiot, infant, feme covert, etc., may be liable when the principals are not liable either to the obligee or to him. So a surety for a corporation in a transaction where the corporation has not the power to contract, may be liable when the corporation is not. And a corporation may exceed its powers where there is no moral turpitude; as a board of county commissioners contracting a debt to build a church, a very praiseworthy object; but still, it is beyond their power, and they would not be bound while their surety would be. Grant then, that the borrowing of money of Poindexter by the county court of Stokes county to pay the bank debt, was not tainted with the political turpitude yet the county court had no power to borrow the money, or to give the bond. It may be true that there were statutes of a rebel legislature which authorized it; but such statutes were void. But while the county court had no power to give the bond, the plaintiff Davis had the power to do it; and there being no moral or political turpitude he is bound by it. But when

he calls upon the people of Stokes county to reimburse or indemnify him, they have the right to answer, that he was not their surety; that the county court was not their agent with power to contract that debt, and therefore, they are not liable.

It may seem hard—it is hard—that the plaintiff should have to bear the whole burden of what was a common cause; and the "pomp and circumstance" of equipping soldiers for the field lost much of its glory when tarnished by the refusal to pay for it; but still there is no obligation which the courts of this government can enforce.

The principles governing this case are discussed more at large in Weith & Avents v. City of Wilmington, 68 N. Car. 112, and in a number of cases in this court within the last few years growing out of transactions in aid of the rebellion, to be found collected in 4 Bat. Digest.

The other branch of this case is governed by the same principles as are enunciated in this branch.

There is no error.

Per curiam.

Judgment affirmed.

SECTION 5. NON-LIABILITY OF SURETY

GEORGE C. McCLATCHIE *v.* JEHIEL V. DURHAM

44 *Mich.* 435, 7 *N. W.* 76 (1880).

Cooley, J.: Durham sued McClatchie in justice's court, declaring generally on the common counts in assumpsit and on the following promissory note:

"$64.00. Pentwater, February 11, 1871.

"For value received I promise to pay to E. Stanhope or bearer the sum of sixty-four dollars on or before the first day of June next.

"George C. McClatchie,
"Jehiel V. Durham."

The peculiarity of the claim upon this note is seen to be that defendant was joint maker with plaintiff. The suit was instituted on the fifth day of July, 1879, so that all remedy upon the note would then have been barred for more than two years but for payments which McClatchie had made upon it, and which had satisfied more than one-half of it. There was no showing that Durham had anything to do with these payments, and therefore the note could not have been enforced against him by any holder.

On the trial Durham established an account against McClatchie to the amount of four dollars. He also showed that he signed the note as surety merely for McClatchie, and that in March, 1878, after the note had ceased to be an obligation against himself, he purchased it, giving his own note for twenty dollars in payment. The defendant then produced and offered the twenty-dollar note as a set-off. The justice disallowed the claim of the plaintiff on the first note, on the ground, apparently, that one could not sue on a note of which he was a joint maker. He then allowed the defendant's set-off, deducting therefrom the account of four dollars, and rendered judgment for the balance in favor of defendant. The plaintiff removed the case by certiorari to the circuit court, where the judgment of the justice was reversed. The defendant then brought the case here.

We do not think the question whether the plaintiff could sue on the note he had signed for McClatchie was a vital one in the case. He certainly had a right to take up the note, and then to sue McClatchie for the amount paid as money paid to his use. His declaration was suited to the case, and the fact that he had declared specially on the note was immaterial. It is true that he may have had a good defense to the note before he purchased it, but he was under no obligation to plead the statute of limitations, and McClatchie could not complain of his paying the note since McClatchie indisputably was still liable upon it. Plaintiff therefore made out a clear right of recovery for the two sums of four dollars and twenty dollars. But the defendant by producing and tendering as an off-set the note of twenty dollars given in purchase of the other, reduced the amount plaintiff was entitled to recover to four dollars. For this he should have had judgment.

On certiorari the circuit court is required to give judgment "as the right of the matter may appear, without regarding technical omissions, imperfections, or defects in the proceedings before the justice, which did not affect the merits." Comp. L. 5477. It should therefore have reversed the judgment the justice had rendered in favor of the defendant, and given one for the plaintiff for the amount he had established. If Durham had brought the case here we might have given him the proper judgment, but as he does not complain of the judgment in the circuit court, and it was only too favorable to McClatchie, we have only to affirm it.

Durham will recover costs of all the courts.

The other justices concurred.

Accord: Stanley v. McElrath, 86 Cal. 449, 25 Pac. 16, 26 Pac. 800, 10 L. R. A. 545.

SECTION 6. BANKRUPTCY OF PRINCIPAL

Section 57 (i) of the Bankruptcy Act provides:

"Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor."

LIEBKE ET AL. *v.* THOMAS

116 *U. S.* 605, 29 *L. ed.* 744 (1886).

Mr. Justice Miller delivered the opinion of the court.

The defendant in error brought his action in the circuit court for the city of St. Louis against the plaintiffs in error, Liebke and Schrage. His petition alleged that on the 8th day of August, 1877, he executed and delivered to defendants, who were partners in trade, his promissory note, payable to their order, for the sum of $500, in three months after date. That the defendants sold said note to the Mullanphy Bank of St. Louis, to which plaintiff, on the 14th day of November, paid the amount of it, less a small sum credited on it as paid by defendants. The sum paid by plaintiff when he took it up from the bank was $435. He alleges that the note was made and delivered to defendants for their use and accommodation, and it was agreed that they would take care of and pay the same when it became due, and hold plaintiff harmless in regard to it.

He further alleges that defendants have failed and refused to pay him any part of said $435, and still refuse to do so, wherefore he prays judgment for the $435, with interest and costs.

The answer of defendants sets up an adjudication of bankruptcy against them October 13, 1877, a composition in bankruptcy under the Act of Congress, duly agreed upon at a meeting of the creditors, and confirmed by the court, in which compliance with the requirements of the law as to such composition is fully set out, and they plead this and the payment of the composition note in bar of the plaintiff's action.

A general denial was made for replication, and the case was tried by the court without a jury. The circuit court gave judgment for plaintiff, and, on appeal to the St. Louis Court of Appeals, this judgment was affirmed.

That court, in its opinion, found in 9 Mo. App. 424, bases its

decision mainly on the proposition that Thomas, the present plaintiff, was entitled to notice of the composition meeting, and had no such notice.

The facts in the case are, that the composition proceedings took place before or about the time of the maturity of the note. The note was then the property of the Mullanphy Bank. This bank had notice of these proceedings, accepted the composition note of the defendants for thirty per cent. of the amount of the debt, according to the terms of the composition, and received the money paid on that note. We think the bank was the owner of the note, the party entitled to be dealt with in the composition proceedings, to take part in them, and receive the money paid under them. All this it did.

Mr. Thomas must be held in law to have had notice of the original bankruptcy proceedings, and that the defendants might be discharged under those proceedings. If he preferred to take part in them rather than entrust the claim to the bank, he could have paid the note and set up his claim as provided in 5070 of the Revised Statutes. He did not do this, but permitted the bank to represent that debt, which, as owner of it, he had a right to do, and to receive the composition money. Mr. Thomas has not been hurt by this; for there is no reason to believe that he would have successfully opposed the composition or received anything more under it than the bank did. It can hardly be held that Mr. Thomas stood in any better condition than a person liable for the bankrupt as bail, security, guarantee, or otherwise, who has not paid the debt. 5070 Revised Statutes.

It is of the essence of the bankrupt law that when the bankrupt has complied with all the conditions of the statute and surrendered his property he should be released from all his debts, except those of a fiduciary character or founded in fraud, of which this is not one. And the case of Wilmot v. Mudge, 103 U. S. 217, decides that though no written discharge be granted, a lawful composition and its performance by the party has the same effect. That case holds that 17 of the Act of 1874, which governs this case, is a part of the bankrupt law, and the proceedings under it discharge all debts which can be discharged under the law, as to creditors "whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed."

As evidence that it is the holder of the promissory note who is to be named in the schedule as one having the right to appear at the composition meeting, the statute 18 Stat. 182, 17, says: "Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor

and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt."

As the statute requires that the composition resolution to be valid "must be passed by a majority in number and three-fourths in value of the creditors of the debtor," the above mode of identifying the creditor and the amount of his debt shows that it is not indispensable that every person contingently interested in a debt of the bankrupt should have notice or take part in the composition proceedings.

It is argued that the liability of defendants to Thomas is not on the note, but on their purpose to pay it at maturity. We can not take this view of it. The note is the essential part of the transaction, and without its payment by Thomas he had no cause of action against defendants. They were both parties to the note and both liable on it to the bank who held it when it became due. Which was principal and which surety could be shown as between themselves by parol, and their liability to or for each other grew out of that transaction.

As parties to it the defendants brought it into bankruptcy that its holder might share in their assets or in the composition, and that they might then be discharged from any obligation on account of it.

The case is strikingly similar to that of Hatch v. Hatch, 28 Law Times (N. S.) 506, Exch. Ch., in which a composition under the English bankrupt law was held to discharge the debt.

The judgment of the St. Louis Court of Appeals is reversed, and the case remanded to that court for further proceedings in accordance with this opinion.

Accord: Lipscomb v. Grace, 26 Ark. 231, 7 Am. Rep. 607; Noland v. Wayne, 31 La. Ann. 401; Crafts v. Mott, 4 N. Y. 604.

WELCOME A. THAYER *v.* JOHN M. DANIELS

110 *Mass.* 345 (1872).

The declaration alleged that the defendant as principal, and the plaintiff as surety, signed a note for $500, dated September 28, 1861, and payable on demand to Nathan George or order, with interest; that the plaintiff signed as surety, without consideration, and for the accommodation of the defendant; that the defendant failed to pay the note; and that the plaintiff had to pay to George the principal of the note to take it up. The answer denied the allega-

tions of the declaration, and also set up the statute of limitations, and a discharge of the defendant in insolvency.

At the trial in the superior court, before Bacon, J., it appeared that the plaintiff executed the note without any consideration, and for the accommodation of the defendant; that the defendant on February 11, 1862, filed his petition for the benefit of the insolvent law; that a warrant was duly issued; that at the third meeting of the creditors George proved the note against the defendant's estate; that a small dividend was then declared; that afterward, in August, 1862, the defendant was duly discharged from his debts; and that on May 1, 1865, the plaintiff paid to George on the note $500, which was less than the amount then due upon it, and took it up. The defendant asked the judge to rule that the statute of limitations began to run against the plaintiff's cause of action from the time the note fell due; and that the discharge in bankruptcy was a bar to the action; but the judge refused so to rule, and ruled that on the foregoing facts the plaintiff was entitled to recover. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

Ames, J.: There was an implied promise, on the part of the defendant, as principal, to indemnify the surety, and to repay to him all the money that he might be compelled, in consequence of his liability as surety, to pay to the creditor. Until the surety has been compelled to make such payment, there is no breach of this implied promise. The cause of action accrues then for the first time, and the statute of limitations then begins to run. Of course the exception that the claim of the plaintiff is barred by the statute can not be maintained. Appleton v. Bascom, 3 Metc. 169; Hall v. Thayer, 12 Metc. 130.

At the time when the defendant petitioned for the benefit of the insolvent law, the plaintiff's cause of action against him had not accrued. Nothing was due at that time from the insolvent to the plaintiff, and whether anything would become due depended upon the contingency of his being compelled to pay, and actually paying, the note, in whole or in part. If the plaintiff had taken up the note, or made a payment upon it, at any time before the making of the first dividend, his claim for the money so paid would have been provable against the estate of the insolvent, under the Gen. Stat., c. 118, 25, and would therefore have been barred by the discharge. But it appears from the report that no money was paid by the plaintiff as surety, and no cause of action accrued to him against the insolvent, until long after the first and only dividend was paid from his estate.

The case of Mace v. Wells, 7 How. 272, which is relied upon by the defendant, arose under the Bankrupt Act of 1841, a statute which differed from our insolvent law in allowing sureties and

other parties under a contingent liability to prove such contingent liabilities as claims upon the estate, and "when their debts and claims become absolute," to have them allowed.

The defendants also insist that the debt itself was provable and was therefore discharged; but this is not true as to the contingent claim of the surety. He had no claim that was provable under the statute, at the date of the discharge.

Two other cases relied upon by the defendant, Wood v. Dodgson, 2 M. & S. 195, and Vasandau v. Corsbie, 8 Taunt. 550, were decided under English statutes which in express terms make the contingent liability of a surety a provable claim against the bankrupt's estate. In the first of these cases the court say that the statute was intended to benefit the sureties, by allowing them to share in the dividend before the estate is all gone, and before the actual payment of their liabilities. Neither of these decisions is applicable to a case under our insolvent laws.

Exceptions overruled.

CHAPTER VIII

EQUITABLE EXONERATION OF THE SURETY

JOSEPH J. NORTON *v.* SAMUEL REID AND JOHN B. SITTON

11 *S. Car.* 593 (1867).

Before JOHNSON, C.: This was a bill quia timet, filed in the court of equity for Pickens district, in the year 1866. The bill was taken pro confesso against the defendant, Sitton. The other matters of pleading and evidence are sufficiently stated in the circuit decree, which is as follows:

On the 17th day of July, 1863, Samuel Reid, as principal, and Joseph J. Norton, as surety, executed their joint and several single-bill for $3,073.05 payable on demand to John B. Sitton or bearer, "with interest compounded from the 27th day of July, 1863," and delivered the same to the said Sitton.

On the 21st day of May, 1866, the complainant filed his bill against the principal to the said single-bill and the payee of the same, alleging that, when it was executed, the defendant, Samuel Reid, was in affluent circumstances, but he now fears that so much of his fortune was swept away by the disastrous termination of the late war that he will not be able to pay his debts; and that he has paid no part of the single-bill on which he is surety, although he has often requested him to pay the same, and thereby discharge him from all liability on the same.

The prayer of the bill is, "that the said Samuel Reid may be required to perform, specifically, his contract, and be decreed to pay to the said John B. Sitton the said sum of money in the said single-bill specified, according to the tenor and effect thereof," with a prayer for general relief.

Samuel Reid, in his answer, pleads to the jurisdiction of the court, on the ground that the complainant has a plain and adequate remedy at law; and further answering, admits that his losses have been very heavy, but insists that, if he is not unnecessarily annoyed by over-anxious creditors, he will be able to pay all debts in a short time. From the evidence there is no great danger of the complainant's having to pay any portion of the single-bill, but his fears on that subject can not be regarded as groundless.

The practice in this state, in similar cases, has been for the surety to pay the debt to the payee, and then proceed against the principal in the law courts, and there is no reason assigned in the pleadings

for not pursuing that course. But Chancellor Harper, in delivering the opinion of the court in the case of Pride v. Boyce, Rice Eq. 275, recognizes the doctrine that it is not necessary for the surety first to pay off the debt to entitle him to a remedy against his principal; and, further, "that a surety may, in equity, compel the creditor to sue, proffering an indemnity against costs and expenses." In the case of Hayes v. Ward et al., 4 Johns. Ch. 562, Chancellor Kent remarks: "It is now considered a settled rule that a surety may resort to chancery if he apprehends danger from the creditor's delay, and compels the creditor to sue the principal debtor, though, probably, he must indemnify the creditor against the consequences of risk, delay and expense."

It is stated in many of the elementary books, in the most general language, that a surety has the right to come into the court of equity for the purpose of compelling the creditor to sue the principal; but, upon an examination of the cases referred to as authority on the subject, it is found that the point was not properly involved in their decision. 2 Amer. Lead. Cas. 1301. Had the bill, however, been filed for the purpose of forcing the defendant, John B. Sitton, to proceed at law against the principal, from the numerous dicta of the most eminent judges, I would not have felt myself at liberty to refuse the relief, but I can find no authority whatever in our laws that would justify me in making the decree prayed for in the bill, though there are authorities supporting the practice. Story's Eq. 850; Brown's Eq. 581, and note 5. There are similar cases in which there are equities that can be properly protected only in this court, but it would be productive of much litigation for the court to give decrees for the payment of money where there are no other or stronger equities than there are in this case. It is ordered and decreed that the bill be dismissed, with costs.

The opinion of the court was delivered by DUNKIN, C. J.:

In Antrobus v. Davidson, 3 Mer. 577, Sir Samuel Romilly remarks: "It is nothing to say that such a bill as the present may have been seldom filed, or that no instance can be produced of such a decree as is prayed by it, if it can be shown by analogy to decided cases, that it is according to principles upon which the court usually acts, and which are completely established."

Grave doubts were for a long time entertained as to the right of the surety to require the creditor to prosecute his demand against the principal debtor. The difficulties are considered by Lord Eldon, in Wright v. Simpson, 6 Ves. 714. It is an interference with the legal rights of the creditor and may disturb his arrangements. He may have looked more to the surety than to the principal debtor. "He may have had so good an opinion (says he) of Sir James Wright's personal responsibility, that he would take a personal contract," etc. (p. 732), and again, "But the surety is a guarantor; and it is his business to see whether the principal pays, and not

that of the creditor" (p. 734). But he admits that, in the late cases, and on the weight of authority, "provided there was no risk, delay or expense, the surety has a right to call upon the creditor to do the most he can for his benefit." Chancellor Kent, in Ward v. Hayes, 4 Johns. Ch. 132, traces this right of the surety to the civil law. By the Justinian code "sureties were allowed to require that before they were sued, the principal debtors should, at their expense, be prosecuted to judgment and execution." But he says he can not find any sufficient authority in the equity jurisprudence of England to lay down any such general rule, although, special circumstances would justify the application of it. Mr. Justice Story (2 Eq. Jur. 849) comments on these cases without adopting any positive conclusion. In Wright v. Simpson, he says Lord Eldon admitted the right under some circumstances. "But, then, in such case the surety is compellable to deposit the money in court for the payment of the creditor." So that, in fact, it is but an indirect subrogation to the right of the creditor upon a virtual payment of the debt by such deposit.

It is now well settled, that upon payment of the debt by the surety, he may have his action against the principal without the aid of this court. 3 Rich. 199; Cheves 15. Such aid is only necessary when he seeks to be subrogated to the rights of the creditor whose debt he has satisfied—to stand in his place, or avail himself of his securities.

But the surety, as is said in Hayes v. Ward, guarantees the performance of the contract by his principal—"it is his business to see whether the principal pays." From a very early day the right of the surety to invoke the aid of this court has been sanctioned, without challenge, by the masters in the law. In 1683 Lord Keeper North speaks thus familiarly of the principle and the reason of it: "He compared the case before him to the case of a counter-bond, where, although the surety is not troubled or molested for the debt, yet, at any time after the money becomes payable on the original bond, this court will decree the principal to discharge the debt; it being unreasonable that a man should always have such a cloud hang over him." Runelaugh v. Hayes, 1 Vern. 189. So, in Nesbil v. Smith, 2 H. Bl. 579, the principal debtor and the surety had joined in the same bond, but the evidence showed that the plaintiff was merely surety for the principal debtor (Maynard). "What is the equity," said Lord Thurlow, "in respect of the surety in the bond? That a surety, generally speaking, may come into this court and apply for the purpose of compelling the principal debtor, for whom he is surety, to pay in the money and deliver him from the obligation. But this case differs from the common case, which forces the surety into this court to be so relieved," etc.

In Lee v. Rook, Moseley 318, Sir Joseph Jekyll, Master of the Rolls, is reported to say: "If I borrow money on a mortgage of

my estate for another, I may come into equity (as every surety may against his principal) to have my estate disencumbered by him."

The cause of action in the principal case is a sealed instrument for the payment of a sum certain on demand, and the character of the plaintiff as surety appears on the face of the instrument. In Antrobus v. Smith, 3 Mer. 569, Sir William Grant, Master of the Rolls, says: "It is true that a surety may come to compel the principal to relieve him of his liability by paying off the debt." But he declined to apply the rule to the case before him (which was that of a bond of indemnity), "because there was no evidence that any sum of money in particular was, at that time, actually due by the principals." In Pride v. Boyce, Rice Eq. 386, Chancellor Harper, speaking for the Court of Appeals, says: "It is sufficiently settled that to entitle himself to a remedy against his principal, the surety is not bound first to pay off the debt." He refers to the foregoing opinion of Sir William Grant as stating accurately the principle, to wit, that the surety may compel the principal to relieve him by paying off the debt. "The complainant," proceeds Chancellor Harper, "comes for this purpose in the present case, and his right to do so is not questioned." Looking to these authorities, the principle is thus announced by Mr. Justice Story, section 849: "Another case of the application of the remedial justice of courts of equity by a bill quia timet, is in cases of sureties of debtors and others. If a surety, after the debt has become due, has any apprehension of loss or injury from the delay of the creditor to enforce the debt against the principal debtor, he may file a bill of this sort to compel the debtor to discharge the debt or other obligation for which the surety is responsible."

It is not enough to say that, in case of danger, the creditor would be sufficiently vigilant for his own sake. He may rest satisfied with the security, or he may have interests antagonistic to those of the surety, and may not be unwilling to indulge the principal creditor, if those interests can be subserved. But, whatever may be the reasons, the principle, as declared by the court in Pride v. Boyce, is "sufficiently settled."

This court is therefore of opinion that there was error in the decree of the circuit court dismissing the plaintiff's bill, and the same is reversed, and the cause remanded to the circuit court.

Decree reversed.

Wardlaw and Inglis, A. JJ., concurred.

Accord: Ascherson v. Tredegar Dock Co., 2 Ch. 401 (1909); Dobie v. Fidelity &c. Co., 95 Wis. 540, 70 N. W. 482; Pavarini & Wyne Co. v. Title Guar. & Surety Co., 36 App. D. C. 348.

The jurisdiction does not rest upon the apprehended insolvency of the principal. Holcombe v. Fetter, 70 N. J. Eq. 300, 67 Atl. 1078.

When the principal has become insolvent, the surety may retain the moneys of the principal or the amount of his indebtedness to the principal as a fund for his indemnity. Craighead v. Swartz, 219 Pa. 149, 67 Atl. 1003; Scott v. Timberlake, 83 N. Car. 382.

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